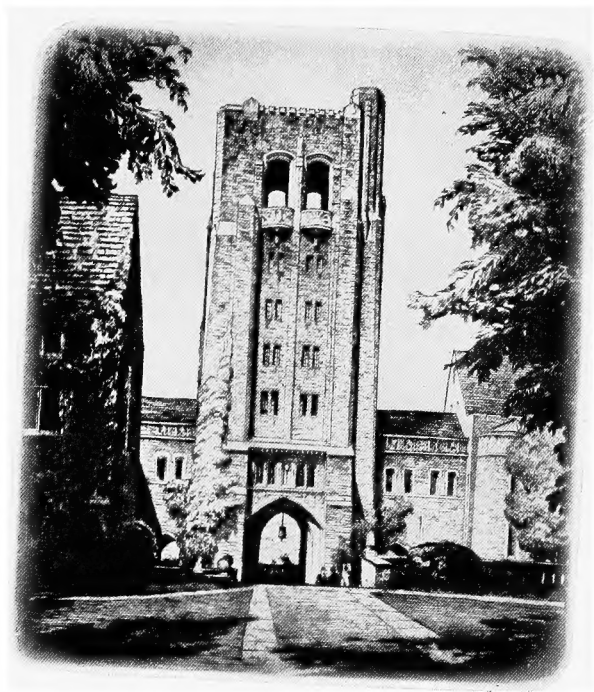


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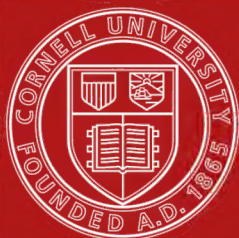
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CASES REFERRED

FROM THE

BOMBAY COURT OF SMALL CAUSES FOR THE
OPINION OF THE HIGH COURT OF BOMBAY,

COMPILED BY

C. W. CHITTY, B.A. (CANTAB.),

BARRISTER-AT-LAW,

CHIEF JUDGE,

AND

RASTAMJI MERVANJI PATELL, M.A., LL.B.,

SECOND JUDGE

OF THE COURT OF SMALL CAUSES, BOMBAY.

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TABLE OF CASES REPORTED.

A.

	PAGE
<i>Abdul Rahiman Abdul Kader vs. Haji Umar Sumar</i> . . .	169
<i>Abdul Razak Haji Abdul Karim vs. Kernan</i> . . .	539
<i>Administrator General of Bombay vs. Jivibai and others</i> . .	137
<i>Ahmedbhai Kikabhai and another vs. Bhanji Damji</i> . . .	151
<i>Anandji Kurpal vs. Shridhar Balkrishna</i>	5
<i>Anupchand Hemchand vs. Champsi Ugerchand</i>	193

B.

<i>Bai Jadhav vs. Tribhowandas Jagjivandas and another</i> . . .	12
<i>Balaji Vishwanath vs. Vishwanath Vittoba</i>	142
<i>Balaram Harichand and others vs. Southern Mahratta Railway Co.</i>	422
<i>Banaji, Receiver, vs. Syed Haji Abdul Saheb</i>	277
<i>Bank of Bengal vs. Vijbhai Gang</i>	290
<i>Bhaiji Bhimji vs. Administrator General of Bombay</i> . . .	580
<i>Bhana Lala and others vs. Dadabhai Sagunbaksh and others</i>	336
<i>Bhayan Mulji vs. Kavarji Jehangir Jasavala and another</i> . .	66
<i>Bombay Tramway Co., Ltd., vs. Khairaj Tejpal</i>	110

C.

<i>Cassam Juma vs. Thakor Liladhur</i>	7
<i>Cursetjee Rustomji Sethna vs. Williams</i>	95
<i>Cutler and another vs. Captain Dreyer</i>	1

D.

<i>Dadabhai Dajibhai Baria vs. Pestonji Merwanji Bharucha</i> . .	367
<i>Damji Megji and others vs. Harvey & Co.</i>	131
<i>Dayal Mowji vs. Nanbai, widow, and another</i>	386
<i>Dharamdas Asanand vs. Kanji Liladhar</i>	505
<i>Dharamji Lalji vs. Municipal Commissioner</i>	362
<i>Dwarkadas Udhavji vs. Bapty Brothers</i>	197

F.

<i>Fatmabai, widow, and another vs. Pirbhai Virji</i>	527
---	-----

	PAGE
Framji Manekji Punjaji and another <i>vs.</i> Secretary of State for India	345
Fulchand Gopalchand Bhaya <i>vs.</i> Hari Vithal Guide and another .	533

G.

G. I. P. Ry. Co. <i>vs.</i> Hanumandas Ramkisson and another . . .	235
Gilbert and others <i>vs.</i> Shaik Nur Cassum	404
Girdhur Damodhur <i>vs.</i> Kassigar Hiragar	375
Gokuldas Madhowji <i>vs.</i> Nursu Yenkuji	227
Govindji Mohunji <i>vs.</i> Manekchand Nagsi	352
Gordbundas Jadavji <i>vs.</i> Harivalbhdas Bhaidas	514
Goverdhandas Gokuldas Tejpal <i>vs.</i> Municipal Commissioner .	281
Goverdhandas Gokuldas Tejpal <i>vs.</i> Municipal Commissioner .	363
Graham and others <i>vs.</i> Hill	30
Guneshdas Ramnarayen and another <i>vs.</i> Luckminarayen and another	409

H.

Haji Allarakhia Nathu <i>vs.</i> Municipal Commissioner	332
Haji Essa Sulleman <i>vs.</i> Dayabbai Purmanandas	460
Haji Sulleman Haji Sumar <i>vs.</i> Narondas Hari	47
Hakma Munji and another <i>vs.</i> Memon Ayab Haji and another .	11
Hassambhai Visram and others <i>vs.</i> B. I. S. N. Co. Ltd. . . .	173
Hearn and others <i>vs.</i> Babu Sajee Naikin	56
Hira Nema and others <i>vs.</i> Pestonji Dossabhai and another . .	550
Hogan <i>vs.</i> Municipal Commissioner	589

I.

Imperial Bank of Persia <i>vs.</i> Fatehchand Khubchand	525
Imperial Manufacturing Co., Ltd., <i>vs.</i> Munchersshaw Burjorji Wadia	210
Ishwardas Tribhowandas <i>vs.</i> Kalidas Bhaidas and others . . .	508

J.

Jaikisson Balaram and others <i>vs.</i> Umaji Bijaychand and others .	453
Jaising Hathising <i>vs.</i> Bholanath Rewashunker	420
Jethabhai Shivji and others <i>vs.</i> Shepherd and another . . .	393
Jivan Nowroj <i>vs.</i> Jaibai, widow, and others	458

K.

	PAGE
Kara Vusonji <i>vs.</i> Kavasji Edalji and another	406
Kharsedji Rustomji Colah <i>vs.</i> Pestonji Cawasji Bucha	187
Khimraj Assu and others <i>vs.</i> Khodabux Fakir Mahomed and another	577
Killick, Nixon & Co. <i>vs.</i> Beyts & Co.	309
Kuverbai <i>vs.</i> Kessowji Lalji	389
Kuverji Nanji and others <i>vs.</i> Umersi Hari and others	314

L.

Ladkibai and another <i>vs.</i> Madhavji Ghella	36
LeGeyt <i>vs.</i> Harvey and another	123
Lukhmidas Khimji <i>vs.</i> Mulji Kanji	85

M.

M. A. Patheria <i>vs.</i> Mohundas Kamalsi	437
Mahomedally Ebrahim Pirkhan <i>vs.</i> Schiller Dosogne & Co.	216
Makanlal Govindram <i>vs.</i> Vijbhukandas Nagardas	317
Maneklal Motilal and another <i>vs.</i> Municipal Commissioner	430
Manockji Merwanji Mehta and another <i>vs.</i> Khansaheb Furdunji Pestonji and another	446
Meghji Anandji <i>vs.</i> Narumal Talakchand	401
Megreponce and others <i>vs.</i> Stearns and another	7
Meherali Mahomed Patell <i>vs.</i> Shaik Nur Kassum	404
Motilal Becherdas and others <i>vs.</i> Ghellabhai Hariram and others	336
Motivahu and another <i>vs.</i> Vinayek Virchand	154
Mulji Govindji <i>vs.</i> Nathubhai Hirachand	246
Murji Lala and others <i>vs.</i> Lingu Makaji and another	482

N.

Nanabhai Cursetji & Co. <i>vs.</i> Haji Hussain Mitha and another	39
Narayen Jetha <i>vs.</i> Municipal Commissioner and others	297
Narsu Kanari and another <i>vs.</i> Linguji Mankuji	427
Natha Hira and another <i>vs.</i> Janardhan Ramchandra and another	58
Nicol & Co. <i>vs.</i> Castle	21
Nowla Uma <i>vs.</i> Bala Dharmaji	60
Nowroji Nusserwanji Thunti <i>vs.</i> Kazi Sidick Mirza Kazi Ahmed Mirza	486

P.

	PAGE
Pratab Daji <i>vs.</i> B. B. & C. I. Ry. Co.	45

R.

Ralli Brothers <i>vs.</i> Gokulbhai Mulchand	261
Ramsabimal Hukmchand and another <i>vs.</i> Kesubdev Mulchand and another	418
Ravji Jairam <i>vs.</i> Bhanu Balu	55
Rattonji Aspandiarji <i>vs.</i> Senna Sella and others	41

S.

Sarasvatibai <i>vs.</i> Janardhan Sakharan Joshi and another	574
Scott <i>vs.</i> Finlay and others	114
Secretary of State <i>vs.</i> Ahmed Saheb bin Mahomed Makba and another	449
Shaik Vali Mahomed Shaik Abdulbhai <i>vs.</i> Alibhai Mula Hasanali	557
Sivji Karamsi and another <i>vs.</i> Beyts and another	286
Smith and others <i>vs.</i> Ludha Ghella Damodar	320
Smith and others <i>vs.</i> Municipal Commissioner	355
Sulleman Hussein <i>vs.</i> New Oriental Bank Corporation Limited	252
Sunderlal Devkinandan and another <i>vs.</i> Gurprasad Musadilal and another	561
Suratram Bhaya <i>vs.</i> G. I. P. Ry. Co.	73

T.

Tejpal Devchand and another <i>vs.</i> Mahomed Jamal and others	472
Thompson <i>vs.</i> The P. & O. S. N. Co.	2
Tukaram Mahadji <i>vs.</i> Janku	135
Tulsa Gulal and others <i>vs.</i> Antone and others	147

U.

Udaychand Budaji and others <i>vs.</i> Bhasker Jagomnath and another	102
---	-----

V.

Vaghji Thakersi and another <i>vs.</i> Pragji Devji	384
Vannali Hargovind <i>vs.</i> Tarachand Ganeshdas	305
Velji Hirji and others <i>vs.</i> Bharmal Shripal and others	519

TABLE OF CASES REPORTED.

v

	PAGE
Venu <i>vs.</i> Kurya Narayan	106
Vijbhukandas Nagardas <i>vs.</i> Lakhminarayan Makhanlal and another	317
Vithoba Laxumon <i>vs.</i> Gangabai	40
Volkart Brothers and others <i>vs.</i> Nusserwanji Jehangir Khum- batta	199

TABLE OF CASES CITED.

A.

	PAGE
Administrator General of Bengal <i>vs.</i> Lala Dyaram, 6 B. L. R. 688.	563
Amrit Ram <i>vs.</i> Dasrat Ram, I. L. R. 17 All. 21	476
Anandji Vishram <i>vs.</i> Nadiád S. & W. Co., I. L. R. 1 Bom. 320	106
Appleby <i>vs.</i> Myers, L. R. 2 C. P. 651	231
Arunachala <i>vs.</i> Vythialinga, I. L. R. 6 Mad. 27	339
Ashbury <i>vs.</i> Ellis, L. R. (1893) A. C. 339	379
Austin <i>vs.</i> The Manchester, Sheffield and Lincolnshire Ry. Co., 16 Q. B. 600 & 10 C. B. 454	81

B.

Bai Shri Majirajbai <i>vs.</i> Narotam Hargovan, I. L. R. 13 Bom. 672.	294
Baily <i>vs.</i> DeCrespigny, L. R. 4 Q. B. 180	231
Bain <i>vs.</i> Fothergill, 7 H. L. C. 158	371
Bankhead's Trust, <i>Re</i> , 2 K. & J. 560	69
Bapuchand <i>vs.</i> Mugutrao, I. L. R. 22 Bom. 340	574
Barham, <i>In re</i> , 69 L. T. 356	503
Barker <i>vs.</i> M'Andrew, 18 C. B., N. S. 759	184
Barker <i>vs.</i> Hodgson, 3 M. & S. 267	231
Barton <i>vs.</i> Gainer, 3 H. & N. 387	190
Bessey <i>vs.</i> Windham, 6 Q. B. 166	251
Best <i>vs.</i> Hamand, L. R. 12 Ch. Div. 1	161
Bhimacharya <i>vs.</i> Fakirappa, 4 B. H. C. R. (A. C. J.) 206	565
Bijadhar <i>vs.</i> Manohar, I. L. R. 10 Cal. 11	474
Bindessuri Pershad Singh <i>vs.</i> Janki Pershad Singh, I. L. R. 16 Cal. 482	480
Binja Ram <i>vs.</i> Rajmohun Roy, I. L. R. 8 Cal. 282	486
Bishambar Nath <i>vs.</i> Nand Kishore, I. L. R. 15 All. 56.	486
Bishop <i>vs.</i> Ware, 3 Camp. 360	120
Bird <i>vs.</i> Brown, 4 Ex. 786	243
Bethell <i>vs.</i> Clark, L. R. 20 Q. B. D. 615	240
Blain, <i>Ex parte</i> , 12 Ch. Div. 522	377
Bourdillon <i>vs.</i> Dalton, 1 Esp. 223	547
Boydonth <i>vs.</i> Grish Chunder, I. L. R. 3 Cal. 26	530
Bowes <i>vs.</i> Foster, 2 H. & N. 779	251

	PAGE
Bowes <i>vs.</i> Shand, L. R. 2 A. C. 455	327
Braiser <i>vs.</i> Hudson, 9 Sim. 1	344
Brandt <i>vs.</i> Lawrence, L. R. 1 Q. B. D. 344	327
Broad <i>vs.</i> Munton, L. R. 12 Ch. Div. 131	167
Brough <i>vs.</i> Whitmore, 4 T. R. 206	184
Bruce <i>vs.</i> Nicolopulo, 11 Ex. 129 ; 24 L. J. Ex. 321	184
Buckle <i>vs.</i> Knoop, L. R. 2 Ex. 125	97
Buckley <i>vs.</i> Barber, 6 Ex. 164	340
Birjmohun Lal <i>vs.</i> Rudra Prakash, I. L. R. 17 Cal. 944	516
Buldeo Misser <i>vs.</i> Syed Ahmed Hossein, 15 Cal. W. R. 143	565
Bull <i>vs.</i> Sibbs, 8 T. R. 327	547
Burton <i>vs.</i> Roberts, 29 L. J. Ex. 484	588
Butchart <i>vs.</i> Dresser, 4 DeG. M. & G. 542	344

C.

Candas Narandas, <i>In re</i> , I. L. R. 11 Bom. 138	502
Carr <i>vs.</i> The Lancashire and Yorkshire Ry. Co., 7 Ex. 707	81
Cassaboglou <i>vs.</i> Gibb, L. R. 11 Q. B. Div. 797	217
Chandler <i>vs.</i> Ford, 3 Ad. & Ellis, 649	196
Chandrakant Mukerji <i>vs.</i> Kartikcharan Chaile, 5 B. L. R. 103	538
Charles <i>vs.</i> Blackwell, L. R. 2 C. P. D. 151	260
Chippendale <i>vs.</i> The Lancashire and Yorkshire Ry. Co., 21 L. J. Q. B. 22	81
Chunder Koomar <i>vs.</i> Gocool, I. L. R. 6 Cal. 370	529
Chunder Sikhur <i>vs.</i> Obhoy Churun, I. L. R. 6 Cal. 8	432
Chundrabulee Debia <i>vs.</i> Bvdy, 9 W. R. 584	141
Christy <i>vs.</i> Row, 1 Taunt. 300	97
Clark, <i>In re</i> , <i>Ex parte</i> Beardmore, L. R. (1894) 2 Q. B. 393	504
Clifford <i>vs.</i> Watts, L. R. 5 C. P. 577	231
Cohen <i>vs.</i> Mitchell, L. R. 25 Q. B. D. 269	498
Collins <i>vs.</i> Blantern, 2 Wils. 341	93
Companhia de Mozambique <i>vs.</i> British South Africa Co., L. R. (1892) 2 Q. B. 358	377
Condon <i>vs.</i> Great Southern & Western Ry., 16 Ir. C. L. R. 415	304
Cooper <i>vs.</i> Phibbs, L. R. 2 H. L. 149	167
Copeland <i>vs.</i> Stephens, 1 Barn. & Ald. 593	545
Coventry <i>vs.</i> G. E. Railway Co., L. R. 11 Q. B. D. 776	521
Cowan <i>vs.</i> Milbourn, I. L. R. 2 Exch. 233	296
Crawshay <i>vs.</i> Eades, 1 B. & C. 181	242
Crispin, <i>Ex parte</i> , L. R. 8 Ch. 374	381
Cehze <i>vs.</i> Steam Navigation Company, L. R. 3 C. P. 14	33

D.

	PAGE
Dadabhai <i>vs.</i> Kuvarbai, 10 B. H. C. R. 386	91
Dalu Malu <i>vs.</i> Palakdhari Singh, I. L. R. 18 All. 479	552
Dan Bahadur Singh <i>vs.</i> Anandi Prasad, I. L. R. 18 All. 435	552
Dandekar <i>vs.</i> Dandekars, I. L. R. 6 Bom. 663	474
Datubhai Ebrahim <i>vs.</i> Abubaker Moledina, I. L. R. 12 Bom. 242	371
Davidson <i>vs.</i> Cooper, 13 M. & W. 343	105
Davlatsing <i>vs.</i> Pandu, I. L. R. 9 Bom. 176	294, 552
Daylutram Shriram <i>vs.</i> Bulakidas Khemchand, 6 Bom. H. C. R. 24	454
De Mott <i>vs.</i> Laraway, 14 Wend. 225	121
De Nicholls <i>vs.</i> Saunders, L. R. 5 C. P. 589	453
Dearden <i>vs.</i> Townsend, L. R. 1 Q. B. 10	53
Dehendra Nath Shaw <i>vs.</i> Aubhoy Churn Bagchi, I. L. R. 9 Cal. 905	480
Dewcurn Jivraj, <i>In re</i> , I. L. R. 12 Bom. 342	496
Dickenson <i>vs.</i> Jardine, L. R. 3 C. P. 639	506
Dowlutram <i>vs.</i> Bulakidas, 6 Bom. H. C. R. 24	414
Dressler, <i>Ex parte</i> , L. R. 9 Ch. D. 252	513
Duckworth <i>vs.</i> Johnson, 4 H. & N. 653	303
Duero, <i>The</i> , L. R. 2 Ad. & Ec. 393	33, 174
Dularchand <i>vs.</i> Bahramdas, I. L. R. 1 All. 453	339

E.

East India Railway <i>vs.</i> Jordan, 4 Beng. L. R. 97, 102	83
Edis <i>vs.</i> Bury, 6 B. & C. 433	258
Edwards <i>vs.</i> McLeay, 2 Sw. 287	466
Edwards <i>vs.</i> Wickwar, L. R. 1 Eq. 68, p. 70	165
Emanuel <i>vs.</i> Bridger, L. R. 9 Q. B. 237	588
Empress Engineering Co., <i>In re</i> , L. R. 16 Ch. Div. 125	215
European and American Steam Shipping Co. <i>vs.</i> Creskey, 8 C. B. (N. S.) 397	333

F.

Farina <i>vs.</i> Home, 16 M. & W. 119	128, 244, 522
Fatchchand <i>vs.</i> Kisan, I. L. R. 18 Bom. 614	486
Feise <i>vs.</i> Wray, 3 East, 93	242
Foakes <i>vs.</i> Beer, L. R. 9 A. C. 605	495
Fowler <i>vs.</i> Lock, L. R. 7 C. P. 272, 285	111
Fowler <i>vs.</i> Roberts, 2 Giff. 226	588
Framjee Cawasjee <i>vs.</i> Hormusjee Cawasjee, 1 Bom. H. C. Rep. 221. 376	

	PAGE
Freedom, The, L. R. 3 P. C. 595	33
Freme vs. Wright, 4 Madd. 364	165

G.

G. I. P. Railway Company vs. Hanmandas, I. L. R. 14 Bom. 57	522
Gajapathi vs. Alagia, I. L. R. 9 Mad. 89	463
Gamble vs. Bholagir, 2 Bom. H. C. R. 161	589
Ganesh Shivram vs. Abdullabeg, I. L. R. 8 Bom. 538	294, 552
Ganput vs. Adarji, I. L. R. 3 Bom. 312	530
Gardner vs. Walsh, 5 E. & B. 83	105
Gatliffe vs. Bourne, 4 Bing. N. C. 314	120
Gaudet vs. Brown, L. R. 5 P. C. 160	120
Gobind Prasad vs. Chunder Sekhar, I. L. R. 9 All. 486	338
Govindappa vs. Kondappah, 6 Mad. H. C. Rep. 131	531
Gray vs. Pullen, 34 L. J. Q. B. 265	302
Great Northern Railway Co. vs. Harrison, 23 L. J. Ex. 308, 310	53
Green vs. Sevin, 13 Ch. Div. 589	374
Greenwood vs. Holquette, 12 Beng. L. R. 42	130
Grimbley vs. Aykroyd, 1 Ex. 479	73
Grizewood vs. Blane, 11 C. B. 538	196
Gumm vs. Tyrie, 33 L. J. Q. B. 97	26
Gungapursad Sahu vs. Maharani Bibi, L. R. 12 I. A. 51	258
Gunn vs. Bolckow Vaughan & Co., 1 L. R. 10 Ch. App. 491	244
Guzerat S. & W. Co. vs. Girdhurlal Dulpotram, I. L. R. 5 Bom. 425	211

H.

Haddow vs. Parry, 3 Taunton, 308	27
Haig vs. Gray, 3 DeG. & Sm. 741	343
Hall vs. Dyson, 17 Q. B. 785	500
Hall vs. Huffam, 2 Lev. 188 & 228	343
Hancock vs. Berry, 36 W. R. 710	190
Harinabalu vs. Cook, 6 Mad. H. C. R. 346	588
Hanson vs. Stevenson, 1 Barn. & Ald. 303	545
Hathesing vs. Laing, L. R. 17 Eq. 92	244
Hayne vs. Culliford, L. R. 4 C. P. D. 182	174
Hearn vs. London & South-Western Railway Co., 10 Ex. 793	427
Heather vs. Webb, L. R. 2 C. P. D. 1	494
Heywood vs. Mallalieu, L. R. 25 Ch. Div. 357	162, 466
Hildreth vs. Sayaji Piraji, I. L. R. 20 Bom. 380	565
Hills vs. Milson, 8 Exch. 751	500

	PAGE
<i>Hinde vs. Liddell</i> , L. R. 10 Q. B. 265	275
<i>Hira Dai vs. Hira Lal</i> , I. L. R. 7 All. 538	565
<i>Hirjibhai vs. Jamsetjee</i> , P. J. (1890) p. 250	474
<i>Holleran vs. Bagnell</i> , 6 L. R. (Ir.) 333	304
<i>Hongkong and Shanghai Banking Corporation vs. T. Baker</i> , 7 B. H. C. R. (O. C. J.) 186	174
<i>Hopper, In re</i> , L. Q. 2 Q. B. 367.	327
<i>Howe vs. Smith</i> , L. R. 27 Ch. Div. 89	471
<i>Hughes vs. Hughes</i> , 16 W. R. 250	392
<i>Hukumchand Oswal vs. Taharunnessa Bibi</i> , I. L. R. 16 Cal. 504	294, 553
<i>Hume vs. Pocock</i> , L. R. 1 Ch. 379	166
<i>Humphreys vs. Welling</i> , 1 H. & C. 7	501
<i>Hunsbutti vs. Ishri Dutt</i> , I. L. R. 5 C. 512	141
<i>Hurreymoney Dossee vs. Gopalchander Mookerjee</i> , 2 Tay. & Bell, 57	63, 90
<i>Hutton vs. Warren</i> , 1 M. & W. 474	334

I.

<i>Illoor Kristniah vs. G. I. P. Ry. Co.</i> , I. L. R. 2 Mad. 310	427
<i>Imperial Flour Mills Compauny, Limited, vs. Lamb</i> , I. L. R. 12 Bom. 647	215
<i>Ireland vs. Livingston</i> , L. R. 5 E. & I. App. 395	217, 242, 327
<i>Isri Dutt Koer vs. Hansbutti Koerain</i> , L. R. 10 I. A. 150	141

J.

<i>Jackson vs. Davison</i> , 4 B. & Ald. 691	500
<i>Jakeman vs. Cook</i> , L. R. 4 Ex. D. 26	494
<i>James vs. Griffin</i> , 2 M. & W. 633	240
<i>Janaki vs. Hafiz Mahomed</i> , I. L. R. 13 Cal. 47	531
<i>Jefferys vs. Boosey</i> , 4 H. L. Cas. 815	378
<i>Jellicoe vs. The British India Steam Navigation Co.</i> , I. L. R. 10 Cal. 489	180
<i>Jessel vs. Bath</i> , L. R. 2 Ex. 267	27
<i>Jhabar Mahomed vs. Modan Sonahar</i> , I. L. R. 11 Cal. 671	294, 553
<i>Jivan Nowroj vs. Jaibai and others</i> , p. 458	575
<i>Jonardan Dobey vs. Ramdhone Singh</i> , I. L. R. 23 Cal. 738	565
<i>Jones vs. Phelps</i> , 20 W. R. 92	494
<i>Joy Prokash Lal vs. Sheo Golam Singh</i> , I. L. R. 11 Cal. 37	430
<i>Juggernath Sewbux vs. Ram Dayal</i> , I. L. R. 9 Cal. 791	195

K.

	PAGE
Kalidas Kevaldas <i>vs.</i> Nathu Bhagvan, I. L. R. 7 Bom. 217, 339, 532	
Kartick Churn Setty <i>vs.</i> Gopal Kisto Paulit, I. L. R. 3 Cal. 264	512
Kearley <i>vs.</i> Thomson, L. R. 24 Q. B. D. 742	503
Kelner <i>vs.</i> Baxter, L. R. 2 C. P. 174	215
Kendall <i>vs.</i> Hamilton, L. R. 4 A. C. 504, p. 516	340
Kerakoose <i>vs.</i> Brooks, 8 Moo. I. A. 339	504
Kerr <i>vs.</i> Willan, 6 M. & Sel. 150	82
Kessowji Damodar <i>vs.</i> Khimji Jairam, I. L. R. 12 Bom.	
507	376
Khwahish Ali <i>vs.</i> Serju Prasad, I. L. R. 3 All. 598	518
Kirchner <i>vs.</i> Venus, 12 Moo. P. C. 361	34
Kleinwort Sons & Co. <i>vs.</i> Comptoir National D'Escompte de Paris,	
L. R. (1894) 2 Q. B. 157	418
Koegler <i>vs.</i> Coringa Oil Company, I. L. R. 1 Cal. 42	327
Krishna <i>vs.</i> Vasudev, I. L. R. 21 Bom. 808	551
Kusturchund <i>vs.</i> Sagarmal, I. L. R. 17 Bom. 413	530

L.

Lachmin <i>vs.</i> Gunga Prasad, I. L. R. 4 All. 485	531
Lachman Das <i>vs.</i> Brijpal, I. L. R. 6 All. 174	480
Laing <i>vs.</i> Zeden, L. R. 17 Eq. 92	244
Lala Jugdeo Sahai <i>vs.</i> Brij Behari Lal, I. L. R. 12 Cal. 505	538
Lalchand <i>vs.</i> Gumtibai, 8 Bom. H. C. R. 140 (O. C. J.)	580
Legard <i>vs.</i> Johnson, 3 Ves. 352—358	390
Levi <i>vs.</i> Ayers, L. R. 3 App. Cas. 842	545
Limpus <i>vs.</i> London General Omnibus Company, 1 H. & C. 526	302
Littledale, <i>Ex parte</i> , 6 DeGex. M. & G. 714	66
Lopez <i>vs.</i> Burslem, 4 Moo. P. C. C. 300	378
Lovell <i>vs.</i> Martin, 4 Taunt. 799	410
Luke <i>vs.</i> South Kensington Hotel Company, L. R. 11 Ch. Div.	
121	338
Lukmidas Khimji <i>vs.</i> Purshotam Haridas, I. L. R. 6 Bom. 700.	
	341
Lutcher <i>vs.</i> Comptoir D'Escompte de Paris, L. R. 1 Q. B. Div.	
709	524
Lydney and Wigpool Iron Ore Company <i>vs.</i> Bird, L. R. 33 Ch.	
D. 85	215

M.

Macleod <i>vs.</i> Attorney General for New South Wales, L. R. (1891)	
A. C. 455	378

	PAGE
McCawley <i>vs.</i> The Ferness Railway Co., L. R. 8 Q. B. 57	33
McClellan <i>vs.</i> Kennard, L. R. 3 Ch. 336, p. 346	340
McEwan <i>vs.</i> Smith, 2 H. L. Cas. 309	128, 522
McKewen <i>vs.</i> Saunderson, L. R. 15 Eq. 229, 20 Eq. 65	503
Maganbhai Hemchand <i>vs.</i> Manchhabhai Kallianchund, 3 Bom. H. C. R. 79 (O. C. J.)	197
Manohur Koyal <i>vs.</i> Thaker Das Naskar, I. L. R. 15 Cal. 319	495
Manni <i>vs.</i> Crooke, I. L. R. 2 All. 296	530
Manzetti <i>vs.</i> Smith, W. N. June 19th, 1883	120
Marsh and Earl Granville, <i>In re</i> , L. R. 24 Ch. Div. 15	167
Marshall <i>vs.</i> Rutton, 8 T. R. 545	390
Marquis of Bute <i>vs.</i> Thompson, 13 M. & W. 487	227
Meghji Hunsraj <i>vs.</i> Ramji Joita, 8 B. H. C. R. (O. C. J.) 169	523
Melhado <i>vs.</i> Porto Alegre Railway Co., L. R. 9 C. P. 503	215
Merchant Banking Co. of London <i>vs.</i> Phoenix Bessemer Steel Co., L. R. 5 Ch. Div. 205	129, 240
Metropolitan Board of Works <i>vs.</i> Steed, L. R. 8 Q. B. Div. 415, p. 447	352
Meyerstein <i>vs.</i> Barber, L. R. 2 C. P. 50	120
Micharaya Guruvu <i>vs.</i> Sadasiv Parama Guruvu, I. L. R. 4 Mad. 319	479
Midland Railway Company <i>vs.</i> Withington Local Board, L. R. 11 Q. B. D. 789	435
Miles <i>vs.</i> New Zealand Alford Estate Company, L. R. 32 Ch. Div. 266	369
Miller <i>vs.</i> Thomson, 3 M. & G. 576	258
Moore <i>vs.</i> Harris, L. R. 1 A. C. 318	396
Morgan <i>vs.</i> Bain, L. R. 10 C. P. 15	249
Morgan <i>vs.</i> The Government of Haidarabad, I. L. R. 11 Mad. 419. 463	
Moss <i>vs.</i> Sweet, 20 L. J. Q. B. 167	512
Mostyn <i>vs.</i> The West Mostyn Coal and Iron Company, L. R. 1 C. P. D. 145	463
Municipal Committee of Moradabad <i>vs.</i> Chatri Singh, I. L. R. 1 All. 269	432
Murray <i>vs.</i> Reeves, 8 B. & C. 421	500
Muthaya Chetti <i>vs.</i> Allan, I. L. R. 4 Mad. 209	376
Myers <i>vs.</i> Sarl, 3 E. & E. 306	334

N.

Nagusha <i>vs.</i> Municipality of Sholapur, I. L. R. 18 Bom. 19	432
Narayan Deshpande <i>vs.</i> Kashinath Krishna Mutalik Desai, I. L. R. 15 Bom. 419	552

	PAGE
Neale <i>vs.</i> Ledger, 16 East. 51	332
Neill <i>vs.</i> Whitworth, 18 C. B. N. S. 435	209
Nepoter, The, L. R. 2 Ad. & Ec. 375	33
New Land Development Association and Gray, <i>In re</i> , (1892) 2 Ch. at p. 147	504
Nicol <i>vs.</i> Mathoorra Dass Dumani, I. L. R. 15 Cal. 509	272
Nicol & Co. <i>vs.</i> Castle, 9 B. H. C. R. 321	179
Nottingham Patent Brick and Tile Co. <i>vs.</i> Butler, L. R. 16 Q. B. Div. 778	463
Nowla Ooma <i>vs.</i> Bala Dhurmaji, I. L. R. 2 Bom. 91	90
Nurbadabai <i>vs.</i> Mahadeo Narayan, I. L. R. 5 Bom. 99	390

O.

Ohrloff <i>vs.</i> Briscall, L. R. 1 P. C. 231	33
Other <i>vs.</i> Iveson, 3 Drew. 177	340

P.

Pandurang Ramchandra <i>vs.</i> Narayan, I. L. R. 8 Bom. 300	294
Paradine <i>vs.</i> Jane, Alcy. 26	232
Pascal, <i>Ex parte</i> , L. R. 1 Ch. Div. 509	
Paterson <i>vs.</i> Gandasequi, 15 East. 62	224
Patesri Partap Narain Singh <i>vs.</i> Champalal, All. W. N. (1891) p. 118	518
Patscheider <i>vs.</i> The Great Western Railway Co., L. R. 3 Ex. Div. 153	78
Peakman <i>vs.</i> Harrison, L. R. 14 Eq. 484	491
Pearee Mohun <i>vs.</i> Abdul Subhan, 7 Cal. W. R. 258	462
Peek <i>vs.</i> North Staffordshire Railway Co., 10 H. L. C. 473	81
Peninsular and Oriental Steam Navigation Co. <i>vs.</i> Shand, 3 Moo. P. C. N. S. 272	33
Pestonji <i>vs.</i> Manekji, 12 M. I. A. 112	336
Pestonji Shapurji Kaka, <i>In re</i> , Bom. H. C. R. 39	499
Phillips <i>vs.</i> Clark, 2 C. B. N. S. 156 ; 26 L. J. C. P. 168	33, 175
Phillips <i>vs.</i> Jones, 9 Sim. 519	231
Phillipotts <i>vs.</i> Phillipotts, 10 C. B. 85	251
Pierpoint <i>vs.</i> Cartwright, L. R. 5 C. P. D. 139	280
Petrocochino <i>vs.</i> Bott, L. R. 9 C. P. 355	120, 396
Pochin <i>vs.</i> Duncombe, 1 H. & N. 842	151
Poorao Chundra Roy <i>vs.</i> Balfour, 9 Cal. W. R. 535	432
Porteus <i>vs.</i> Watney, L. R. 3 Q. B. D. 227. on App. 534	203
Powles <i>vs.</i> Hider, L. J. 25 Q. B. 331	111

	PAGE
<i>Pragilal vs. Maxwell</i> , I. L. R. 7 All. 284	530
<i>Price vs. Khilat Chandra Ghose</i> , 5 B. L. R. App. 50	432

Q.

<i>Queen vs. Clark</i> , L. R. 1 C. C. R. 54	280
--	-----

R.

<i>Radhamoney Boystoney vs. Anundomaye Dabey</i> , 2 Ind. Jur. 144, 146	62, 91
<i>Radley vs. London and North-Western Railway Co.</i> , L. R. 1 A. C. 758	303
<i>Raghavendra Madhav vs. Bhima</i> , I. L. R. 16 Bom. 349	344
<i>Raisett vs. G. I. P. Railway Co.</i> , I. L. R. 17 Bom. 723	427
<i>Rajan Harji vs. Ardesir Hormusji Wadia</i> , I. L. R. 4 Bom. 76	251
<i>Ramchandra Pandurang vs. Madhav Purushotam</i> , I. L. R. 16 Bom. 23	565
<i>Ramchurn Mullick vs. Luchmeechund Radakissen</i> , 9 Moore's P. C. C. 46. p. 69	582
<i>Ramdas, Brij Govandas, In re the petition of</i> , I. L. R. 10 Bom. 107.	531
<i>Ramghulam vs. Janki Rai</i> , I. L. R. 7 All. 124	294
<i>Ram Narain vs. Ram Chunder</i> , I. L. R. 18 Cal. 86	338
<i>Rampartab Mull vs. Jakeeram Agurwallah</i> , I. L. R. 23 Cal. 991	563
<i>Ramtahal Ram vs. Rameshar Ram</i> , I. L. R. 8 All. 140	565
<i>Ramsebuk vs. Ramlall Koondoo</i> , I. L. R. 6 Cal. 815	339
<i>Ram Surun Singh vs. Mussamut Pran Peary</i> , 13 M. I. A. 551	94
<i>Ranchhod Varajbhai vs. The Municipality of Dákor</i> , I. L. R. 8 Bom. 421	432
<i>Ray vs. Barker</i> , L. R. 4 Ex. Div. 279	512
<i>Reg. vs. Brown</i> , L. R. 24 Q. B. D. 357	280
<i>Richardson vs. Horton</i> , 6 Beav. 185	340
<i>Ridgway vs. Sneyd</i> , Kay. 627	227
<i>River Wear Commissioners vs. Adamson</i> , L. R. 2 App. Cas. 770	232
<i>Roberts, Doe. dem., vs. Roberts</i> , 2 B. & Ald. 367	93
<i>Robertson vs. French</i> , 4 East. 136	26
<i>Robinson vs. South Western Railway Co.</i> , 34 L. J. C. P. 234	427
<i>Rogers, In re, Ex parte Collins</i> , L. R. (1894) 1 Q. B. 425	504
<i>Rogers, In re, Ex parte Woodthorpe</i> , 8 Morrell. 236	504
<i>De Rothschild vs. Royal Mail Steam Packet Co.</i> , 7 Ex. 734, 21 L. J. Ex. 273	184
<i>Rouse and Meier, In re</i> , L. R. 6 C. P. 212	327

	PAGE
Rudra Prokash Misser <i>vs.</i> Bhola Nath Mukherjee, I. L. R. 12 Cal. 612	516
Rummens <i>vs.</i> Hare, L. R. 1 Ex. Div. 169	190
Ryall <i>vs.</i> Rowles, 1 Ves. 348	172

S.

Sadasook Gambir Chand <i>vs.</i> Kannayya, I. L. R. 19 Mad. 96.	572
Sahibzada Zenulabdin Khan <i>vs.</i> Sahibzada Ahmed Raza Khan, L. R. 5 I. A. 233	570
Samal Nathu <i>vs.</i> Jaishankar Dalsukram, I. L. R. 9 Bom. 254	474
Sandeman <i>vs.</i> Scurr, L. R. 2 Q. B. 86.	183
Sashti Charan Chatterjee <i>vs.</i> Tarak Chandra Chatterjee, 8 B. L. R. 315	480
Sassoon <i>vs.</i> Hurry Das Bhukut, I. L. R. 24 Cal. 455	572
Scott <i>vs.</i> Lord Ebury, L. R. 2 C. P. 255	215
Searle <i>vs.</i> Law, 15 Sim. 95	191
Seaton <i>vs.</i> Mapp, 2 Coll. 556	167
Secretary of State for India <i>vs.</i> Budhu Nath Poddar, I. L. R. 19 Cal. 538	427
Sellamayyan <i>vs.</i> Muthan, I. L. R. 12 Mad. 61	294
Shankar Dat Dube <i>vs.</i> Radha Krishna, I. L. R. 20 All. 195	570
Shillito <i>vs.</i> Hobson, L. R. 30 Ch. Div. 396	190
Shirekuli Timappa Hegade <i>vs.</i> Ajjibal Narashinv Hegade, I. L. R. 15 Bom. 297	536
Shortt <i>vs.</i> Abdul Rahiman, 6 Bom. H. C. R. (O. C. J.) 53	442
Srinivasa Charlu <i>vs.</i> Balaji Rau, I. L. R. 21 Mad. 232	572
Simpson <i>vs.</i> Crippin, L. R. 8 Q. B. 14	327
Sketchley, <i>In re</i> , 1 DeGex. & J. 163	66
Sominath <i>vs.</i> Muthayya, I. L. R. 15 Mad. 417	530
Skipwith <i>vs.</i> The Great Western Railway Co., 4 'Times' Law Rep. 529; 59 L. T. 520	427
Sorabji Nassarvanji Dundás <i>vs.</i> The Justices of the Peace for the City of Bombay, 12 Bom. H. C. R. (O. C. J.) 250	432
Spaight <i>vs.</i> Farnworth, L. R. 5 Q. B. D. 115	97
Spicer <i>vs.</i> Cooper, 1 Q. B. 424	327
Spratt <i>vs.</i> Jeffery, 10 B. & C. 249	161
Sreemutty Shibosoonder Dossee <i>vs.</i> Taracknath Pandit, 2 Ind. Jur., note to p. 145	62
Steel <i>vs.</i> State Line S. S. Co., L. R. 3 App. Cas. 72	173
Stewart <i>vs.</i> Rogerson, L. R. 6 C. P. 424	397
Straker <i>vs.</i> Kidd, L. R. 3 Q. B. D. 223	203
Subbaraya Mudali <i>vs.</i> The Government, 1 Mad. H. C. Rep. 286	376

	PAGE
Subodini Debi <i>vs.</i> Cumar Ganoda Kant Roy Bhadur, I. L. R. 14 Cal. 400	532
Suffell <i>vs.</i> Bank of England, 7 Q. B. D. 270. page 271, 7 Q. B. D. 270.	104
Suppu <i>vs.</i> Govindacharyar, I. L. R. 11 Mad. 85	480
Suput Singh <i>vs.</i> Imrit Tewari, I. L. R. 5 Cal. 720	350
Surjan Raot <i>vs.</i> Bhikari Raot, I. L. R. 21 Cal. 213	476
Sykes <i>vs.</i> N. E. Railway Co., 44 L. J. (N. S.) C. P. 191	303

T.

Tanbruan <i>vs.</i> Pacific Steam Navigation Co., Asp. M. L. C. 336	33
Tattersall <i>vs.</i> The National Steam Ship Company, L. R. 12 Q. B. D. 297	177
Taylor <i>vs.</i> Caldwell, 3 B. & S. 826, 32 L. J. Q. B. 164	227, 231
Taylor <i>vs.</i> Goodwin, I. L. R. 4 Q. B. D. 228	590
Thacker <i>vs.</i> Hardy, L. R. 4 Q. B. Div. 685	196
Thakur Das <i>vs.</i> Fatteh Mull, 7 B. L. R. 275	410
Thomson <i>vs.</i> Davenport, 9 B. & C. 78	224
Titterton <i>vs.</i> Cooper, L. R. 9 Q. B. D. 473	546
Toolsa Goolal <i>vs.</i> John Antone, I. L. R. 11 Bom. 443	585
Tronson <i>vs.</i> Dent, 8 Moo. P. C. 419	34
Tuff <i>vs.</i> Warman, 5 C. B. (N. S.) 573	303
Tully <i>vs.</i> Terry, L. R. 8 C. P. 679	97
Tulsidas Dhunjee <i>vs.</i> Virbassapa, I. L. R. 4 Bom. 624	143
Turner <i>vs.</i> Richardson, 7 East 335	547

V.

Varajlal <i>vs.</i> Kachia I. L. R. 22 Bom. 473	559
Venables <i>vs.</i> Smith, L. R. 2 Q. B. Div. 279	111
Venkaji Babaji Naik <i>vs.</i> Shidramapa Balapa Dcsai, I. L. R. 19 Bom. 663	484
Venkatachala <i>vs.</i> South Indian Railway Co., I. L. R. 5 Mad. 208. 426	
Venkatesh Khandu <i>vs.</i> Chanapgavda, I. L. R. 17 Bom. 674	474
Vishnu Vishwanath <i>vs.</i> Hur Patel, I. L. R. 12 Bom. 499	294, 552

W.

Waddell <i>vs.</i> Wolfe, L. R. 9 Q. B. 515	161, 463
Walji Karimji <i>vs.</i> Jaganath Premji, I. L. R. 2 Bom. 84	62, 91
Walton <i>vs.</i> S. E. Railway Company, 4 C. B. N. S. 296	305
Wheeler <i>vs.</i> Bramah, 3 Camp. 340	547

	PAGE
Whitehead <i>vs.</i> Lord, 21 L. J. Exch. 239	57
Williams <i>vs.</i> Ellis, L. R. 5 Q. B. D. 175	590
Wilson <i>vs.</i> Madras Municipality, I. L. 19 Mad. 83	590
Wingfield, <i>Ex parte</i> , L. R. 10 Ch. D. 591	512
Wolfe <i>vs.</i> Great Northern Railway Company, 26 L. R. (Ir.) C. L. 548	304

Y.

Yella <i>vs.</i> Munisami, I. L. R. 6 Mad. 101	294
Yeknath <i>vs.</i> Warubai, I. L. R. 13 Bom. 285	516

ERRATA.

26. Footnote, for '111' read '97.'
93. ,, for 'Will.' read 'Wils.'
97. 16th line from bottom, for 'Rau' read 'Row.'
106. Footnote, for 'I. L. R. 2 Bom. 321' read 'I. L. R. 1 Bom. 320.'
130. 2nd line from top, for 'Holgarth' read 'Holquette.'
151. 18th line from bottom, for 'lessor' read 'vendor.'
- Footnote, for 'H. & N. 842' read '1 H. & N. 842.'
167. 2nd line from bottom, for 'Phipps' read 'Phibbs.'
180. Footnote (1), read 'I. L. R. 10 Cal. 489.'
196. Footnote (1), read 'L. R. 4 Q. B. D. at page 689.'
- ,, (3), read '11 C. B. 538.'
197. 5th line from top, for '(1)' read '(2).'
215. 10th line from bottom, for 'Sydney' read 'Lydney.'
244. 5th line from top, for 'Blocklow' read 'Bolckow.'
260. Footnote (1), read 'L. R. 2 C. P. D. at page 159.'
275. 9th line from bottom, for 'Hume vs. Palmer' read 'Hinde vs. Liddell.'
- 5th do. do. for '262' read '268.'
294. Footnote (1), read 'I. L. R. 8 Bom. 300.'
327. Do. (4), read 'L. R. 2 Q. B. 424.'
333. 2nd line from top, for 'Navigation' read 'Shipping.'
334. Footnote (2), read '3 E. & E. at p. 320.'
338. Do. (2), read 'I. L. R. 18 Cal. 86.'
340. Do. (2), read '6 Ex. 164.'
377. Do. (2), read 'L. R. (1892) 2 Q. B. 358 at p. 394.'
392. Footnote (1), read '16 W. R. 250.'
410. Do. (1), read '4 Taunt. 799.'
418. Do. (1), read 'L. R. (1894) 2 Q. B. 157.'
427. 8th line from top, for 'Kristinah' read 'Kristniah.'
435. 6th do. for 'Wellington' read 'Withington.'
442. Footnote (1), read '6 Bom. H. C. R. (O. C. J.) 53.'
453. Do. (1), read 'L. R. 5 C. P. 589.'
522. 1st line from top, for 'Howe' read 'Home.'
547. Footnote (4), read '1 Esp. 223.'

CASES REFERRED
FROM THE
COURT OF SMALL CAUSES
FOR THE OPINION OF THE
HIGH COURT, BOMBAY.

FRANK CUTLER AND ANOTHER, PLAINTIFF, versus CAPTAIN
DREYER, MASTER OF THE SHIP "GRENADA," DEFENDANT.

1861.
April 27.

*Bill of Lading—Words "weight, contents, and numbers unknown"—Negligence
of Master.*

The words "weight and contents and numbers unknown" inserted in the margin of a bill of lading constitute no defence to a loss found to have been caused by the negligence of the master of the ship whilst the goods were under his charge.

CASE stated for the opinion of the Supreme Court under section 55 of Act IX. of 1850.

1. This action was brought to recover the damage alleged to have been sustained by the plaintiffs in consequence of the defendant's negligence in not having taken proper care of a consignment of 140 cases of brandy received by him as master of the ship "Grenada" to be conveyed from Calcutta to Bombay. The particulars of the loss were twenty-one quart bottles of brandy missing and fifteen quart bottles found broken in the cases, the value of the three dozen being Rs. 96.

2. The defendant relied upon these words inserted in the margin of the bill of lading: "Weight and contents and numbers unknown," and upon the boat-note signed by the plaintiff's man Juma Kema, who took delivery of the consignment on the 30th of January.

1861.

FRANK
OUTLER
VS.
CAPTAIN
BREYER.

3. On the evidence I came to the conclusion that "the damage complained of from deficiency as well as from breakage in the bottles arose from the want of proper care while the consignment was in the custody of the defendant."

4. For the reasons assigned in my written judgment and upon the authority of the cases therein referred to, I held that the words relied upon in the bill of lading did not exempt the master from any of the consequences arising from his negligence, and I further expressed an opinion that such words would only have the effect of protecting him, as against the shipper or his agent, when he was in a position to prove that goods different in quality or in quantity from those represented by the bill of lading had in fact been shipped, owing wholly to the fraud or mistake of the shipper, or of his agent.

5. But as the question of law involved in this case, namely, what is the legal effect of the words inserted in the margin of the bill of lading, is one on which I "entertain doubts," I "gave judgment" for the plaintiffs "contingent upon the opinion of the Judges of the Supreme Court on this question," which I now solicit.

JUDGMENT OF THE SUPREME COURT—(Sir Mathew Sausse, C.J.)

This Court is of opinion that the insertion of the words "weight and contents and numbers unknown" in the margin of the bill of lading constitute no defence to a loss found to have been caused by the negligence of the master of the ship whilst the goods were under his charge.

1862.
April 3.

CHARLES THOMPSON, PLAINTIFF, versus THE PENINSULAR AND ORIENTAL STEAM NAVIGATION COMPANY, DEFENDANTS.

Merchant Seaman—Discharge and Settlement—Claim—Evidence—Act to amend the law relating to Merchant Seamen (I. of 1859, section 46).

Plaintiff shipped under articles with the defendant company, dated 3rd December 1860, in which Sydney was agreed upon as the port of discharge. On arrival in Bombay plaintiff signed fresh articles for service in the same vessel, which engagement terminated on the 6th February 1862, when a release of all claims in respect of such second engagement was signed by the plaintiff before a shipping master. The plaintiff now claimed a return passage to Sydney.

Held, that a claim to be discharged at the port of Sydney was created in favour of

the plaintiff by the articles of the 3rd December 1860, and that under section 46 of Act I. of 1859 no evidence could be received of the release and satisfaction of such claim except a discharge and settlement on foot of those articles before a shipping master.

1862.

 CHARLES
 THOMPSON
 vs.
 THE P. AND O.
 COMPANY.

CASE stated for the opinion of the Supreme Court under section 55 of Act IX. of 1850.

1. The plaintiff in this case filed a plaint against the defendants stating his causes of action as follows:—"To recover the amount of passage-money to Sydney, pursuant to agreement dated the 3rd December 1860, Rs. 300."

2. The plaintiff shipped under articles bearing date the 3rd day of December 1860, on board the "Jeddo," a ship registered in England, for a voyage from Sydney to any port or ports in the Australian colonies, from thence to any port or ports in the Indian Ocean, Red Sea, or China Sea, proceeding backwards and forwards, between any of the intermediate ports, as the nature of the transport or mail service might require, provided his services should not be required beyond a period of eight months, and that Sydney should be the final port of discharge; and amongst other stipulations it was provided that "should the vessel not return to Sydney the crew must be transferred to some other vessel in the Peninsular and Oriental Company's service, to be paid at the same rate of wages they shipped for under this agreement, until discharged at Sydney, and to do duty in that ship as required."

3. Upon the arrival of the "Jeddo" at Bombay, the crew were mustered on deck and informed that all who wished to return to Sydney would be transferred to a vessel which would start for that port on the following day, and that those who wished to remain in the Peninsular and Oriental Company's service were to "stand out." Amongst those who "stood out" was the plaintiff, who shortly afterwards signed fresh articles for service in the same vessel. This second engagement terminated in Bombay on the 6th of February 1862, when a release of all claims in respect of such second engagement was signed by the plaintiff before a shipping master. The plaintiff then demanded a return passage to Sydney under the agreement contained in the first articles. This request was refused.

4. For the defence it was contended that the taking of a re-employment, signing fresh articles, and passing a release on the termination

1862.

CHARLES
THOMPSON
vs.
THE P. AND O.
COMPANY.

of the second engagement operated to discharge the defendants from any liabilities or claims under the first articles, that such articles having been allowed to expire by effluxion of time could not now be enforced, and that the Court had no jurisdiction to entertain the action for damages, but that the plaintiff's remedy was by an application to a Magistrate under the English Merchant Shipping Act.

5. Upon the above facts and argument, I held that as no release in respect of the defendant's agreement to provide the plaintiff with a return passage to Sydney, or in respect of the first articles had been signed by the plaintiff in the presence of a shipping master, the plaintiff had not relinquished his right under those articles, and that the defendants in refusing to furnish him with a return passage had committed a breach of contract, for which the plaintiff was entitled to recover damages.

6. In delivering judgment I gave a verdict in plaintiff's favour for the amount claimed, subject to the opinion of the Judges of the Supreme Court, which is now requested.

JUDGMENT OF THE SUPREME COURT.—(Sir Mathew Sausse, C.J., and Arnould, J.)

We think that the circumstances contained in that case disclose a state of facts in which "Discharge and settlement before a shipping master" are required under the provisions of Act I. of 1859 entitled "An Act for the amendment of the law relating to Merchant Seamen."

We think that a claim to be discharged at the port of Sydney was created in favour of the plaintiff by the shipping articles of 3rd December 1860.

We think that under rule 4 of section 46 of Act I. of 1859 no evidence could be received of the "release or satisfaction" of that "claim" except a "discharge or settlement" on foot of these articles before a shipping master.

No such "discharge and settlement" having been forthcoming at the trial, we think the verdict for the plaintiff ought to stand.

ANANDJI KURPAL, PLAINTIFF, versus SHRIDHAR
BALKRISHNA AND ANOTHER, DEFENDANTS.1864.
Dec. 15.*Contract—Agreement for sale of house—Title—“Fajindári ground.”*

A contract for sale of a house and premises simply described as “standing on Fajindári ground, belonging to the Mahájans of Pinjrapole and paying Rs. 50 a year rent” is not supported by the production of an English lease with an unexpired term to run of twenty-five years only at that rent and containing on the part of the tenant a covenant to surrender the ground at the expiration of that time “with all erections and buildings then standing or being thereon,” and with a further covenant that the tenant “should not directly or indirectly build or use the premises for any religious purpose.”

CASE stated for the opinion of the High Court under section 55 of Act IX. of 1850.

1. This action was brought to recover the sum of Rs. 250 for money had and received by the defendants to the use of the plaintiff.

2. The plaintiff by a written agreement bearing date the 29th of September 1863, contracted to purchase a house from the defendants for the sum of Rs. 12,201.

3. In the counterpart signed by the defendants the property sold is described as “my own one house, together with the garden, one room, one cookroom, one well, and all the trees situated at Bombay, without the Fort, in Gulálwádi, behind the Pinjrapole. The said house bears the assessment No. 63. The said ground is Fajindári belonging to the Mahájans of the Pinjrapole.”

4. At the time of the sale it was stated to the plaintiff that the land on which the house is built was subject to a rent to the Fajindárs of Rs. 50 a year, but he was not informed that it was held under a lease.

5. After the contract had been entered into the defendants produced the title deeds and documents in their possession to enable the plaintiff to prepare the conveyance of the said premises. On examining these documents it appeared that the defendants were possessed of merely a leasehold interest in the land for an unexpired term of about twenty-five years, as assignees of a lease bearing date the 11th April 1838, whereby the then owner of the land demised the premises to one Raghunath Laxuman for a term of fifty years, from the 14th February 1838, with a covenant for renewal for another term of fifty years, subject to the covenant and conditions contained in the said lease.

1864.

ANANDJI
KURPAL
vs.
SHRIDHAR
BALKRISHNA.

6. The plaintiff on learning the nature of defendants' interest refused to complete the contract and claimed to be entitled to treat it as cancelled, and thereupon brought this suit to recover back his earnest-money.

7. It was admitted that the land is Fajindári land, that is land for which the Mahájans of the Pinjrapole pay "pension and tax" to the Government.

8. For the plaintiff it was contended at the trial that the expression "the ground is Fajindári belonging to the Mahájans," taken in connection with the preceding passage, amounted to a representation, or a warranty, that the ground was held by the defendants in perpetuity, subject only to the payment of a fixed ground rent to the Fajindárs.

9. It was further argued on behalf of the plaintiff that a general agreement to sell landed property "means a sale of the fee-simple" or in this country, an estate in perpetuity, and that as it appeared on investigation that the defendants were possessed of only a term of years the plaintiff was entitled to rescind the contract.

10. For the defendants it was contended that the expression "the ground is Fajindári" did not amount to any such representation or warranty, as was contended for by the plaintiff, and that the doctrine of English law, that a general agreement to sell landed property means a sale of the fee-simple, not of a lease of years, could not be applied to Hindus, whose law does not recognise the English division of estate and term.

11. The Court held that the expression "the said ground is Fajindári" did not amount to a representation or warranty that the land was held in perpetuity subject only to the payment of a fixed rent, and that by the words in the contract "belonging to the Mahájans" the plaintiff had express notice that all the defendants intended, or contracted, to sell, was a superstructure erected on the land of a third person, and that it was the duty of the plaintiff to have ascertained the terms on which the land was held before he entered into the agreement.

12. The Court gave a verdict for the defendant with costs. The question for the High Court was whether under the circumstances hereinbefore stated that verdict was right or wrong?

JUDGMENT OF THE HIGH COURT (Sir Mathew Sausse, C.J., and Arnould, J.).

We are of opinion that a contract for the sale of a house and premises simply described as "standing on Fajindári ground belonging to the Mahájans of Pinjrapole and paying fifty rupees a year rent" is not supported by the production of an English lease, with an unexpired term to run of twenty-five years only at that rent and containing on the part of the tenant a covenant to surrender the ground at the expiration of that time "with all erections and buildings then standing or being thereon," and with a further covenant that the tenant "should not directly or indirectly build or use the premises for any religious purpose." The title produced materially differed from that contracted for, and the onus of making enquiry in that particular previous to entering into the contract was not thrown upon the plaintiff.

The consideration for the contract having thus failed, we are of opinion that the plaintiff is entitled to recover back the earnest-money paid together with interest at the rate stipulated in the contract.

1864.

ANANDJI
KURPAL
vs.
SHRIDHAR
BALKRISHNA.

J. R. MEGREPONTE AND OTHERS, PLAINTIFFS, versus
W. F. STEARNS AND ANOTHER, DEFENDANTS.

1869.

Aug. 5.

Shipping order—Condition—Responsibilities for goods "shut out."

There is nothing repugnant or unreasonable in a condition inserted in a shipping order to the effect that the shipowners are not responsible to the shippers for loss on account of goods being "shut out," that is, excluded from the ship for want of available space.

CASE stated for the opinion of the High Court under section 55 of Act IX. of 1850 and section 7 of Act XXVI. of 1864.

1. This action was brought to recover the difference of freight on 150 bales of cotton for which the defendants had given to the plaintiffs a shipping order at £6 per ton per the defendants' steamer "Neera" to sail on April 21st, 1869, but which was shut out of that ship and sent by the plaintiffs per the steamer "Behar" at £7 10s. per ton.

2. There were also other two items claimed by the plaintiffs as being extra charges caused by the act of the defendants in shutting out the plaintiff's cotton.

1869.

J. B. MEGRE-
PONTE
vs.
W. F. STEARNS.

3. The shipping order was admitted, as was also the correspondence, and there was no dispute whatever as to the facts save as to the two items of Rs. 32 and Rs. 18-12 forming the second and third items in plaintiff's bill of particulars annexed to the summons.

4. The defendants on the principal items of Rs. 660-5-4 rested their defence solely on the third condition in the shipping order, namely, the company is not responsible for loss on account of goods being "shut out."

5. For the plaintiffs it was contended that the condition was an unreasonable one and could not be taken advantage of by the defendants.

6. The facts were these:—The plaintiffs having obtained the order on the 20th of April sent 150 bales of cotton alongside the "Neera" before 12 o'clock noon on the 21st April, and their agent was then informed, as was the fact, that there was not room in the "Neera" for more than about thirty bales, which the defendants offered to take but the plaintiffs refused to ship.

7. One of the defendants, Mr. Kittredge, deposed that he had many years' experience in the trade of shipping cotton per steamer from Bombay to Suez; that the term "shut out" is used in a technical sense in shipping matters, and means excluded from the ship for want of available space.

8. He then deposed to the following facts, which I find proved in this case:—That it is exceedingly difficult to say what number of bales a ship will contain. That in a ship of the size of the "Neera" it is impossible to tell within 150 bales of what she will contain. That he used every precaution on all occasions, and especially on the voyage in question, not to issue shipping orders for a larger quantity of cotton than the ship would contain. That he had a daily report from the officers of the ship as to her remaining capacity from day to day as the loading proceeded. That whenever he had any doubt as to the capacity of the ship to take the cotton for which he issued a shipping order, it was his custom to inform the intending shipper of the fact either verbally or by a note on the order. That in the present case he had no doubt whatever to the "Neera's" capacity to take 150 bales when he issued the order: and that he actually issued an order subsequent to the order in

question for 200 bales, being still satisfied of the capacity of the ship to take all the cotton for which orders had been issued. That he believed the plaintiff's cotton was the only cotton shut out on this occasion, and that he could only account for it by the fact that a great number of boats arrived with cotton just before noon on the 21st, and that the ship was loaded in a hurried manner, and not as advantageously as regarded space as she might have been.

9. On this evidence Mr. Macpherson, Counsel for the defendants, required me, in case I should decide for the plaintiffs, to state a case for the opinion of the High Court.

10. Counsel, as to the form of the question to be submitted, pressed me to reserve for the High Court the question whether taking into account the intention of the defendant in inserting the condition No. 3 in the shipping order, and their acts in relation to this order, and the smallness of the order itself, the condition was unreasonable or the contract was repugnant.

11. I refused to state the question in that form, being of opinion that the question of repugnancy should be deemed on the contract itself.

12. I was of opinion that the third condition was repugnant and unreasonable, and that the defendants could not sustain a defence founded upon it.

13. As to the other items Mr. Theodore A. Vlasto, of the plaintiffs, deposed that the plaintiffs had a contract with their mukádams under which the plaintiffs would be liable to pay the mukádams the demurrage in item No. 2, as the boats had to return from the "Neera" and proceed to another ship and had been detained two days longer than they would have been had the cotton been taken by the "Neera." He admitted that their mukádams take the risk of reasonable demurrage. As to the hamalage he stated that he had been paid and it was rendered necessary by the fact that certain holidays occurred at the time during which the Musalmán sailors who had taken the cotton to the "Neera" would not work and the plaintiffs were obliged to transfer the cotton into boats owned by Hindus.

14. I found a general verdict for the plaintiffs for the amount claimed, subject to the opinion of the High Court on the questions :

1869.

J. R. MEGRE-
PONTÉ
vs.
W. F. STEARNS.

(1) Is the third condition in the shipping order repugnant or unreasonable?

(2) Are the defendants liable for demurrage on the facts above stated?

I found for the plaintiffs, and gave a verdict for Rs. 711-1-4 with costs, and I certified Rs. 51 as plaintiff's professional costs.

The shipping order in question was as follows:

"The Bombay and Bengal Ship Company.

No. 643.

Bombay, 20th April 1869.

Chief Officer s.s. "Neera" For Liverpool.

150 bales cotton.

Freight at £6 per ton at 40 cubic feet.

The above shipping order is granted subject to all the clauses and conditions of the company's bills of lading and to the following conditions:

1. The whole of the above goods to be alongside by the 21st instant before 12.

2. If the above goods be not alongside by the above date and be thereby excluded, the shippers to pay freight on the excluded cargo at the stipulated rate as liquidated damages.

3. The company is not responsible for loss on account of goods being shut out.

4. This order is not transferable.

5. Goods to be measured on board for tonnage without regard to Chamber of Commerce's scale.

6. Customs' passes must accompany the receipt and be exchanged for bills of lading.

(Signed) STEARNS, HOBART & Co."

JUDGMENT OF THE HIGH COURT (Sir Richard Couch, Kt., C.J., and Westropp, J.)

We are of opinion that there was nothing repugnant or unreasonable in the third condition of the shipping order, and that the defendants are not liable for the demurrage.

HAKMA MANJI AND ANOTHER, PLAINTIFFS, versus MEMON
AYUB HAJI AND ANOTHER, DEFENDANTS.

1871.
Jany. 14.

Promissory Note—Agreement to pay interest—Penalty.

An agreement in a promissory note to pay interest at the rate of $12\frac{1}{2}$ per cent per mensem after the expiration of the two months allowed for the repayment of the principal (interest for those two months at the same rate being included in the principal sum) is not a penalty from which the person executing the promissory note can be relieved.

CASE stated for the opinion of the High Court under section 55 of Act IX. of 1850.

1. This action is brought to recover Rs. 258-2-0, being interest for seven months at the rate of $12\frac{1}{2}$ per cent *per mensem*, on a promissory note for Rs. 295 made by the defendant on the 30th November 1868.

2. On behalf of the defendants it was contended before the Third Judge of this Court that the object of the agreement to pay so high a rate of interest as $12\frac{1}{2}$ per cent *per mensem* was to secure the repayment of the principal sum at the stipulated time, that the agreement was therefore in the nature of a penalty from which the defendants ought to be relieved on payment of interest at the rate of 9 per cent per annum.

3. The amount for which the note has been taken includes interest charged in advance at the agreed rate of $12\frac{1}{2}$ per cent for the two months that the note has to run.

4. The Third Judge was of opinion that the high rate of interest stipulated for was not a penalty, and that the Court could not relieve the defendants from paying it, and gave a verdict for the plaintiffs for the full amount claimed.

5. The Full Court, however, to which an application was made on behalf of the defendants, considered that the case fell within the principle laid down by the High Court in the cases of *Russaji Dowlaji vs. Syana Sydu* and *Mottaji Rutnaji vs. Shaik Hussein*, 6 B. H. C. R. (A. C. J.) 7 and 9, and subject to the opinion of that Court on the following question reduced the verdict to the amount of interest at the rate of 9 per cent per annum.

6. The opinion of the Judges of the High Court is now solicited on the following question:—Is the agreement in the promissory note to pay interest at the rate of $12\frac{1}{2}$ per cent per month after the

1871.

HAKMA
MANJI
vs.
MEMON
AYUB HAJI.

expiration of the two months allowed for the repayment of the principal a penalty from which the defendants can be relieved?

JUDGMENT OF THE HIGH COURT (Sir Richard Couch, C.J., and Bayley, J.)

We are of opinion that in this case the agreement is only that if the money is not paid at the end of the two months, interest at the same rate as was paid for the two months shall continue to be paid, and that it is not an agreement for increased interest on default in payment, as it was in the cases referred to. That doctrine does not apply to such a case as the present, and the interest cannot be treated as a penalty from which the defendants can be relieved; but Act XXVIII. of 1855 does not affect the Hindu law as to interest (see 3 B. H. C. R. (A. C. J.) 23 and 12 Cal. W. R. 9 App. from O. J.) We therefore direct that the case be remitted to the Court of Small Causes for a new trial, in order to determine whether the rate of interest claimed does not exceed what the plaintiff is allowed to take by Hindu law, which is very fully stated in the judgment of Sir Barnes Peacock in the case above quoted, and to decide the case accordingly.

1872,
Octr. 3.

BA'I JADHA'V, PLAINTIFF, versus TRIBHUVANDA'S JAGJIVANDA'S
AND ANOTHER, DEFENDANTS.*

Trustee—Breach of trust—Liability of passive trustee for—Breach of trust by his co-trustee—Small Cause Court—Equitable jurisdiction, extent of—Act IX. of 1850, sections 25 and 32—Act XXVI. of 1864, section 2.

A trustee who having accepted a trust remains passive and takes no steps to see the trust carried into execution, is liable for losses arising from the breach of trust of his co-trustee.

The Court of Small Causes has an equitable jurisdiction only in the cases specified in section 32 of Act IX. of 1850, as the provisions of section 2 of Act XXVI. of 1864 do not extend to the class of cases over which the Court has jurisdiction, but only enlarge the amount for which it may make a decree.

CASE stated for the opinion of the High Court under section 55 of Act IX. of 1850 and section 7 of Act XXVI. of 1864.

* Reported in 9 B. H. C. R., 333.

1. A question raised in this suit was on the 30th of January last submitted by me for the opinion of the Judges of the High Court.

2. The suit was instituted to recover the value of a pair of gold wristlets entrusted to the defendants by the plaintiff's late husband for the purpose of being by them converted into money and the proceeds invested at interest with a banker for the use of the plaintiff. I held that the claim was barred by the law of limitation. The Judges of the High Court, however, were of opinion that the defendants were trustees within the second section of Act XIV. of 1859, and therefore that the plaintiff's claim was not barred. The non-suit was set aside and the case remitted to this Court for trial on the merits.

3. I have now tried the cause and the evidence given before me has established the following facts:—The two defendants were relatives of Tapidás Makundás, the plaintiff's deceased husband; during his last illness the deceased was removed to the house of the first defendant Tribhuvan Jugjiwan; a few days before his death the two defendants Tribhuvan Purshotum, the brother of Goverdhun, the second defendant, and several others met in the room in which the deceased was lying, and at the dictation of the deceased Tribhuvan Purshotum wrote his will or testamentary paper. A short time before this paper was written the wristlets, the subject-matter of this suit, were, in the presence of the parties assembled, handed by the deceased to the defendant Tribhuvan Jugjiwan for the purpose of being disposed of in accordance with the writing, and the paper itself was made over to the other defendant Goverdhun Purshotum. It has been in his possession ever since and was produced by him at the trial.

4. It will be observed that in the first paragraph of the will or testamentary paper the name of the defendant Tribhuvan Jugjiwan alone appears. With reference to this, I may mention that it was at the suggestion of the plaintiff's father and with the consent of the other defendant, Goverdhun Purshotum, that the name of the latter was added as a co-trustee in the subsequent part of the document. No evidence was given as to what was done with the wristlets after they were delivered to Tribhuvan Jugjiwan.

1872.

BÁI JADHÁV
vs.
TRIBHUVAN-
DÁS JAGJÍ-
VANDÁS.

1872.

BÁI JADHÁV
vs.
TRIBHUVAN-
DÁS JAGJI-
VANDÁS.

5. The defence set up by the defendants was :—By the first defendant, a denial that the wristlets were given to him. By the second defendant, a denial that he was present when the paper was written, or that he was aware that the wristlets had been given to his co-defendant, but he failed to give any satisfactory explanation as to how the paper came in his possession. I disbelieved the statements of the defendants, and the facts set out in the preceding paragraph are to be taken as having been proved.

6. On the evidence I gave a verdict against both the defendants for the value of the wristlets, Rs. 650, subject to the opinion of the High Court on the following questions :

(1) Has the defendant Goverdhun Purshotum by his conduct rendered himself liable, with the other defendant as a trustee, to make good to the plaintiff the value of the trust property ?

(2) As the defendants have been held to be trustees, can they be sued in the Court of Small Causes by the *cestui que trust* for the recovery of the specific trust property or the value thereof ?

By the 25th section of Act IX. of 1850 constituting this Court, every defence which would be deemed good in the Supreme Court sitting as a Court of Equity shall be a good bar to any legal demand in the Court of Small Causes, but it appears to me doubtful whether this Court possesses an equitable jurisdiction for plaintiffs, except in the two instances (partnership account and a legacy) in which such jurisdiction is expressly given to it by the 32nd section of the Act.

(3) If the defendants are liable to make good the value of the trust property, are they not also liable for the interest which, but for their breach of trust, the plaintiff would have received since 1859, and has not the plaintiff, by suing for the value of the property only, divided her cause of action the whole of which would exceed the money jurisdiction of the Court ?

7. I may add that this last defence was not taken by the defendants, but when the objection was pointed out by me at the close of the case, the plaintiff's pleader applied to me to amend the summons by adding (on payment of the court-fees) Rs. 350 to the particulars of demand for interest, thus making the claim Rs. 1,000

and abandoning the excess of interest, but I did not think it was then competent for me to do so.

8. I now solicit the opinion of their Lordships on the three questions above stated.

The case was argued on the 30th of August 1872 before Sargent, Acting C.J., and Green, J.

The defendant Tribhuvan did not appear.

Tyabji (*Maghew* with him) for the defendant Goverdhundas—As to the first point, the defendant Goverdhundas is not, under the will, a trustee in respect of the subject-matter of this suit, and even if he is, there is nothing to show that he has been guilty of a breach of trust or of any misconduct.

As to the second point, this being a suit between *cestui que trust* and trustee, the Small Cause Court has no jurisdiction to try the suit. The only jurisdiction the Small Cause Courts have is conferred by sections 25 and 32 of Act IX. of 1850. The words in section 25 “and every defence which would be deemed good in the Supreme Court sitting as a Court of Equity shall be a good bar to any legal demand” show that their jurisdiction is confined to legal demands, for these words would have been unnecessary if they had equitable jurisdiction. Section 32 confers a limited equitable jurisdiction on the Small Cause Courts: *Expressio unius est exclusio alterius*. The Small Cause Courts, for more than twenty years, have refused to try equity cases and they have no legal machinery for carrying out complicated equity decrees.

Inverarity for the plaintiff—On a true construction of the will Goverdhundas is a trustee, and he has been found to be so by the Judge of the Small Cause Court. The question is whether he has, by his conduct, made himself liable for not carrying out the trusts of the will. The most favourable view the Court can take of his conduct is that he stood by and did nothing to see that the trusts were carried out; if so, he is liable. The law knows not a passive trustee: *Lewin on Trusts*, page 170. Trustees may not delegate their office to any one, not even to a co-trustee: *Lewin on Trusts*, page 205, and cases there cited.

As to the second question, the terms of section 25, which should be read with section 37 of Act IX. of 1850, are wide enough to give

1872.

BÁI JADHÁV
vs.
TRIBHUVAN.
DÁS JAGJI-
VANDÁS.

1872.

BÁI JADHÁV
vs.
TRIBHUVAN-
DÁS JAGJI-
VANDÁS.

equitable jurisdiction to the Small Causes Courts. The words are "All suits where the debt or damage claimed or value of the property in dispute &c." This is a suit where the value of the property in dispute is not more than the amount up to which the Small Cause Courts have jurisdiction. The words "every defence which would be deemed good in the Supreme Court sitting as a Court of Equity shall be a good bar to any legal demand," only mean that points of equity may be determined by the Court if they arise in a legal action, and this is quite consistent with the Court having the power to try pure equity cases. By the provisions of section 2 of Act XXVI. of 1864 the jurisdiction of the Court extends "to the recovery of any debt, damage, or demand" &c.; it is not restricted to a legal demand, but expressly provides for any demand. The word "demand" is one of the widest signification in our law.

SARGENT, J.—What are the words in the English County Court Act 9 and 10 Vict. c. 95?

The words there are "all pleas of personal actions where the debt or damage claimed" &c. (section 58). The English County Courts have a limited equitable jurisdiction under 28 and 29 Vict. c. 99, but it must not be forgotten that they sit in a country where there are distinct courts for law and equity. When Act XXVI. of 1864 was passed, that distinction no longer existed here, law and equity being administered in the same Court.

Tyabji in reply.

On the 3rd October 1872 the Judgment of the Court was delivered by GREEN, J.—In the present case three questions are reserved for the opinion of this Court by the Third Judge of the Bombay Court of Small Causes. From the statement submitted by that Judge, it appears to have been held by him that the defendant Goverdhan Purshotum had been constituted a trustee, jointly with the defendant Tribhuvandás Jagjivandás, of certain ornaments, namely, the two gold wristlets mentioned in the amended particulars of demand. Though it is not one of the questions referred to us, we may state that, in our opinion, the Judge was right in so holding. No doubt, in the earlier part of the document, bearing date the 14th August 1859, the name of the defendant Tribhuvandás Jagjivandás alone is mentioned as a trustee, but in the latter part of it, that of the defendant Goverdhandás Purshotumdás is

added, and the Judge finds, as a matter of fact, that this was done by consent of Goverdhandás himself. He also finds that the document was on its execution made over to the defendant Goverdhandás Purshotumdás (as indeed appears from the document itself) and has been in his custody ever since and was produced by him on the trial. The first question which the Judge has reserved for our opinion is as to the liability of the defendant Goverdhandás with the defendant Tribhuvandás to make good to the plaintiff, Bái Jadháv, the value of trust property. The trusts, on which, according to the document of the 14th August 1859, the gold wristlets in question were held by the defendants (so far as concerns the plaintiff and so far as it is necessary to mention them for the present purpose), were, after the death of Tapidás Mukundás (the deceased husband of the plaintiff and the party executing the document and which death occurred shortly afterwards), to sell the same and deposit the proceeds at interest and pay such interest to Bái Jadháv during her life. The defendant does not allege that the wristlets or the proceeds of their sale have been lost under circumstances that would exonerate them from liability; on the contrary, the defendant Tribhuvandás at the trial denied that the ornaments were ever delivered to him, and the defendant Goverdhandás denied that he was present when the document of the 14th August 1859 was written or that he was aware that the ornaments had been given to his co-defendant. These denials, however, have been disbelieved by the Judge who heard the suit, and the case stands thus:—that the defendant Tribhuvandás having received into his hands the ornaments in question, does not appear since 1859 ever to have done anything towards carrying into execution the trusts reposed in him in respect of them, and his co-trustee Goverdhandás, so far as appears, has stood by and in no way interfered to see that such trusts were carried into execution. This being so, we are of opinion, whatever the ultimate liability of the defendant Tribhuvandás to his co-defendant may be, that the proximate liability of the latter, so far as regards the plaintiff, is the same as that of the former. Whether, however, the liability of the defendants or either of them is to make good to the plaintiff the value of the trust property is another matter as to which we shall have to say more hereafter.

The second question, namely, whether the defendants, as trustees,

1872.

BÁI JADHÁV
vs.
TRIBHUVAN-
DÁS JAGJI-
VANDÁS.

1872.

BÁI JADHÁV
vs.
TRIBHUVAN-
DÁS JAGJI-
VANDÁS.

can be sued in the Court of Small Causes by the *cestui que* trust for the recovery of the specific trust property or the value thereof, raises an important question as to the extent of the jurisdiction of the Courts constituted under Act IX. of 1850 amended by Act XXVI. of 1864, the question, namely, whether those Courts have general jurisdiction over trusts. By section 25 of Act IX. of 1850 the jurisdiction given to the Small Causes Courts is over "all suits where the debt or damage claimed or value of the property in dispute is not more than Rs. 500, whether on balance of account or otherwise." The same section provides "that every defence which would be deemed good in the Supreme Court, sitting as a Court of Equity, shall be a good bar to any legal demand in the Court of Small Causes," and excludes certain specified classes of suits from the cognizance of the Court. A subsequent section (section 32) extends the jurisdiction of the Court "to the recovery of any demand not exceeding the sum of Rs. 500, which is the whole or part of the unliquidated balance of a partnership account or the amount or part of the amount of a distributive share under an intestacy or of any legacy under a will." At the time that Act IX. of 1850 was passed, the distinction between law and equity, as being two systems of rules having each peculiar and appropriate forms and procedure for the enforcements of the rights given by those rules respectively, existed in the Supreme Courts of the Presidency Towns. The words "debt and damage" in section 25, and in fact the language of Act IX. of 1850 generally, seems to us to indicate that the Legislature intended to give general jurisdiction to the Small Cause Courts only over matters which would have been the subject of a plea side action in the Supreme Court. Had it been intended to limit the jurisdiction merely by pecuniary amount, and not also by class and nature of rights and violations or withholding of rights, there would seem to be no reason for section 32 expressly giving the Court jurisdiction over partnership accounts, shares under an intestacy, or legacies under a will. The provisions in section 25 authorizing equitable defences to legal demands, was, in our opinion, introduced with the object of rendering unnecessary an application on the Equity Side of the Supreme Court for an injunction against a proceeding in the Small Causes Court to enforce a legal demand to which, in a Court of Equity, there would have been a defence.

This provision and section 32 are, in our opinion, a strong argument against the supposition that the Small Causes Courts under Act IX. of 1850 were intended to have any general equitable jurisdiction, and we believe that it has been always considered that under that Act those Courts had no such jurisdiction except so far as it is expressly given by section 32. Then came Act XXVI. of 1864, of which the preamble is as follows :—"Whereas it is expedient to increase the limit of the jurisdiction of the Courts of Small Causes held under Act IX. of 1850 and to increase the number of Judges of the said Courts," and by section 2 it is provided that "the jurisdiction of Courts held under Act IX. of 1850 shall extend to the recovery of any debt, damage, or demand exceeding the sum of Rs. 500, but not exceeding the sum of Rs. 1,000, and to all actions in respect thereof (except the several actions specified in the proviso in section 25 of the same Act)." The language of this section is no doubt more comprehensive than that of section 25 of Act IX. of 1850, and might, taken by itself, be held to give jurisdiction in all classes of suits where the appropriate remedy would be a money decree and where the amount sought to be recovered did not exceed Rs. 1,000, without regard to the consideration whether the right, sought to be enforced, would have been the subject of an action on the Plea Side or of a bill in equity on the Equity Side of the Supreme Court. It may further be mentioned that at the time Act XXVI. of 1864 was passed, the distinction between Law and Equity, as involving different systems of judicial procedure, had ceased to exist in Bombay on the abolition of the Supreme Court and the establishment of the High Court. But we think that the greater generality of the language of the section quoted, as compared with that of section 25 of Act IX. of 1850, may be accounted for by this that the Legislature was increasing the limit of the jurisdiction of the Court in such classes of suits as it had jurisdiction in before, and had to employ words which would effect this in respect not only of the suits of a legal nature, which the Court had been empowered to entertain under section 25 of the Act of 1856, but also of the suits of an equitable nature which the Court had been empowered to entertain under section 32 of the same Act. The object of the Legislature, in passing Act XXVI. of 1864, was, we consider, to increase the money limit of the jurisdiction of the Court, not to enlarge the class of suit

1872.

BÁI JADHÁV
VS.
TRIBHUVAN-
DÁS JAGJI-
VANDÁS.

1872.
 BAI JADHAV
 vs.
 TRIBHUVAN-
 DAS JAGJI-
 VANDAS.

over which it had jurisdiction, and the language of that Act, taken in conjunction with its preamble, does not necessarily import more than this. Besides, to hold that the later Act (subject, of course, to limit in respect of amount) gives a general equitable jurisdiction to the Court (which perhaps at first sight section 32 might, as we have said, seem to import) would involve the unreasonable supposition that the Legislature intended to give such jurisdiction between the money limits of Rs. 500 and Rs. 1,000, but to refrain from doing so where amounts less than Rs. 500 were involved, and we cannot find in either Act, or in the Acts taken together, any provision or provisions the effect of which would be to give such jurisdiction in the case of such last named amounts. The present case, however, is an example, we consider, of a class of cases where it would be very desirable that the Courts of Small Causes should have jurisdiction, namely, whenever an appropriate remedy can be afforded by a decree for a definite sum of money. But under the present Acts, we are of opinion that the Small Causes Courts cannot enforce trusts, unless the trust sought to be enforced is one for the payment of a distributive share under an intestacy or a legacy under a will, the value of the claim being not greater than Rs. 1,000, and we must, therefore, answer the second question in the negative. We may, however, observe that the same answer would have been given to this question had it been put with regard to a suit in the High Court. The proper decree to be made, in the circumstances stated in the case, would be to appoint a new trustee or trustees of the document of the 14th August 1859 in the place of the defendants, that the defendants do deliver to such new trustee or trustees the ornaments or their value, and that the defendants do pay to the plaintiff the loss of interest sustained by her by reason of the defendants' breach of trust. Under the declaration of trust of the 14th August 1859, the plaintiff is not entitled to have the ornaments or their value delivered or paid to her individually, but only to the interest of the proceeds of the sale of them for her life. She has, however, a right to enquire that the capital fund, out of which such interest is to come, be placed in a proper state of security and properly invested.

We do not consider it necessary, having regard to the opinion we have expressed on the two first questions, to express any on the third

question reserved, except that, in our opinion, the defendants are liable to make good the value of the trust property in the sense above mentioned, but not to the plaintiff; but that they are liable, in a Court having jurisdiction over trusts, to make good to the plaintiff the loss of interest she has sustained.

Though the verdict passed against the defendants cannot stand, having regard to the opinion expressed above on the questions reserved, yet we should strongly recommend the defendants to satisfy the plaintiff's demands without further litigation. So far as we can at present judge, upon a suit being instituted against them in the High Court, there would be a decree to restore the ornaments or their value and to pay to the plaintiff the amount of interest which, had the defendants fulfilled their trust, she ought to have received, and on such a decree they would certainly have to pay the costs of the suit.

As to the costs of the parties of reserving and stating the said questions for the opinion of this Court and of the argument thereof, we order that the parties do respectively bear their own costs.

Attorneys for plaintiff—*Dallas and Lynch.*

Attorney for defendant Goverdhandás—*C. Tyábjí.*

1872.

BÁI JADHÁV
VS.
TRIBHUVAN-
DÁS JAGJI-
VANDÁS.

W. NICOL AND COMPANY, PLAINTIFFS, versus J. S. CASTLE,
DEFENDANT.*

*Bill of lading—"Weight, contents, and value unknown"—Action against master
—Assignee of bill of lading for value—Construction—Act IX. of 1856, section 3.*

1872.

Octr. 8.

A bill of lading purporting to be for fifty tons of coals and containing a printed clause "weight, contents, and value unknown" and similar words written above the signature of the master, does not amount to an admission by the master that he has received fifty tons of coal on board.

Upon the true construction of the Bills of Lading Act (IX. of 1856), section 2, a bill of lading in the above form is not, in the hands of a consignee for value, conclusive evidence against the master of the shipment of fifty tons.

CASE stated for the opinion of the High Court under section 55 of Act IX. of 1850 by N. Spencer, Third Judge.

* Reported at 9 Bom. H. C. R. 321.

1873.

W. NICOL AND
COMPANY
vs.
J. S. CASTLE.

1. The action was brought to recover Rs. 125 as damages for the non-delivery of five tons of coal part of a consignment of fifty tons alleged to have been shipped on board the steam ship "Hutton" of which the defendant was the master.

2. The following are the facts of the case :

There was shipped on board the "Hutton" at the port of Sunderland a quantity of coal and coke on account of Messrs. Smith, Fleming, and Company, which was made deliverable by the bill of lading to Messrs. W. Nicol and Company at Bombay. The mode adopted at Sunderland of weighing coal intended for shipment, which was followed in the present case, is for the tender in which the coal is loaded to be run on to a weighbridge, the net weight of the coal is then ascertained by subtracting the weight of the truck, the trucks are then run on to a stage over the ship's hold into which the coal is tipped. The coals in question were stowed in the 'tween deck in a compartment by themselves and screened off from the rest of the cargo by plank partitions. In addition to the plaintiff's coal and coke there was shipped on board the "Hutton" 1,200 tons of other coal and a general cargo. The loading of the ship was completed in two or three days. No person connected with the ship or on behalf of the master or owners was present when any part of the cargo of coal was weighed. The weight was taken from the agents of those employed by the shippers. During the voyage, coal, it is admitted, loses in weight by evaporation and by being broken. The percentage of loss varies according to the quality of the coal. The coal in this case being "double-screened" the loss, it is said, ought to have been very small. The defendant signed a bill of lading, a copy of which is set out at the end of the case. Freight was paid in London on fifty tons.

3. Messrs. W. Nicol and Company (the plaintiffs) are consignees, for value, of the coal. On the arrival of the "Hutton" in Bombay, Messrs. W. Nicol and Company addressed a letter to Messrs. Thomas Stewart and Company, the consignees of the ship, stating that they were the consignees of fifty tons coal per s.s. "Hutton," and as the owners or agents had the option of delivering over the ship's side or on shore, requested to be informed what arrangements Messrs. Thomas Stewart and Company intended to make about weighing as they

(Messrs. W. Nicol and Company) would only take delivery per ton of twenty cwts. weighed over to them.

4. Thomas Stewart and Company elected to avail themselves of the option given to them by the bill of lading and employed their own agents to land the cargo. The coal put into the lighters alongside the ship was, as averred by the defendant and proved by his witnesses, the whole that was shipped at Sunderland on account of Messrs. Smith, Fleming, and Company, but as it was not then weighed, there was no evidence to show whether it was, or was not, less than fifty tons. When weighed in the wharf, however, and made over to the plaintiff's mukádam there were only forty-five tons.

5. The only evidence given to show that fifty tons had been shipped was the bill of lading and an invoice forwarded by Messrs. Smith, Fleming, and Company to Messrs. W. Nicol and Company, in which the latter are debited with fifty tons. The invoice, it was stated by one of the witnesses for the plaintiffs, is usually prepared from the bill of lading.

6. For the defendant it was contended that there was no evidence of the quantity shipped, that although in the body of the bill of lading in written words the quantity was said to be fifty tons, this statement was qualified by the printed condition "weight, contents, and value unknown" and again by the written words "weight unknown" above the signature, and that the defendant by so signing did not admit that fifty tons had been shipped. For the plaintiff it was argued (1) that the two statements in the bill of lading were inconsistent or repugnant; that a master could not qualify a positive written statement in a bill of lading; that a certain quantity of goods had been shipped by such general words as "weight unknown," and that these words being in a foot-note must not be taken to be part of the bill, and (2) assuming that in an action by the shippers it was open to the defendant to show that the quantity mentioned in the bill had not been shipped, yet in an action by the plaintiffs, consignees for valuable consideration, under section 3 of the Indian Bill of Lading Act (IX. of 1856), the bill was as against the defendant conclusive evidence of the shipment.

7. I held—(1) That the two statements in the bill of lading were not inconsistent or repugnant; that the printed words "weight, contents, and value unknown" controlled the written statements of

1872.

W. NICOL AND
COMPANY
vs.
J. S. CASTLE.

1872.

W. NICOL AND
COMPANY
vs.
J. S. CASTLE.

weights; that the master by signing the bill did not admit that fifty tons had been shipped, and therefore there was no evidence as to the quantity put on board, and (2)—That the bill as qualified did not represent that fifty tons had been shipped, and that as the plaintiffs had accepted the bill with the qualification, they were as much bound by it as the shippers.

8. I non-suited the plaintiffs subject to the opinion of the Judges of the High Court on the following questions:

(1) Is the bill of lading in this case evidence that fifty tons of coal had been shipped?

(2) Is the bill of lading in the hands of the plaintiffs, consignees for valuable consideration, conclusive evidence as against the defendant of the shipment of fifty tons?

The bill of lading was in the following form, the written portions of it being printed in italics:

"Shipped in good order and well conditioned by Messrs. Smith, Fleming, and Company upon the steam ship "Hutton," whereof Castle is master for this present voyage and now lying in the port of Sunderland and bound for Bombay (*via Suez Canal*),

Fifty tons coals.

One hundred and twenty-one tons seven hundredweight Ramsay's Patent condensed coke.

Gosman and Smith, 144, Leaden Hall Street, E.C.

Shippers are requested to note particularly the terms and conditions of this bill of lading with reference to the validity of their insurance upon their goods.

Shippers are cautioned against shipping goods of a dangerous or damaging nature, as by so doing they become responsible for all consequential damage and also render themselves liable to penalties imposed by Statute.

Tons
50
121—7.

Being marked and numbered as per margin, and to be delivered subject to the exception and conditions at foot hereof in the like good order, and well conditioned, at the aforesaid port of Bombay unto Messrs. W. Nicol and Company or assigns. Freight and primage for the said goods to be first paid in London, ship lost or not lost, at the rate of twenty-five shillings per ton of twenty hundredweight.

In witness whereof the Master or Purser of the said ship hath affirmed to three bills of lading, all of this tenor and date, the one of which bills being accomplished, the other to stand void.

Dated in Newcastle, 13th December 1871."

The following are the exceptions and conditions above referred to:

Weight, contents, and value unknown.

The act of God, the Queen's enemies, &c. (Then followed the exceptions for

which the master was not to be rendered liable and which are of no importance for this report.)

A written declaration of the contents and value of goods must be delivered by the shippers to the owners, with the bills of lading, and an untrue declaration shall release the captain and owners of ship from all responsibility.

The ships are to be at liberty to sail with or without pilots, and to tow and assist vessels in all situations, and also to deviate from the voyage for any purpose or to touch and stay at other ports either in or out of the way.

The owners are to be at liberty to carry the said goods to their port of destination by the above or other steamer or steamers, ship or ships, either belonging to the owners or to other persons proceeding either directly or indirectly to such port, and to tranship or land and store the goods either on shore or afloat, and re-ship and forward the same at the owner's expense but at merchant's risk.

In the event of transit to and from Suez and Alexandria the goods will be landed, forwarded, conveyed, or re-shipped at the owner's expense, but at merchant's risk, and in no case will the owners be responsible for accident, loss, damage, delay or detention, however caused, in the course of such landing, transit, or re-shipment.

The owners or their agents shall have the option of making delivery of the goods under this bill of lading either over the ship's side, or from lighters, or a store-ship, or custom-house, or warehouse, at merchant's risk.

Consignees or their assigns must be ready to take delivery of goods as soon as the ship is ready to discharge them, otherwise the owners or their agents shall be at liberty to land and warehouse and discharge them into a store-ship at the merchant's risk and expense, and shall have a lien thereon for such expense.

Weight unknown.

The case came on for argument before Sargent, Acting Chief Justice, and Bayley, J., on the 20th of September 1872.

Anstey and Marriott for plaintiffs.

There was no appearance for defendant.

SARGENT, C.J. :—This matter comes before the Court on a reference from the Third Judge of the Small Cause Court, and arises out of an action brought by the firm of Nicol and Co. to recover from the defendant, as master of the steam ship "Hutton," damages for non-delivery of five tons of coal, part of a consignment of fifty tons said to have been shipped on board the above vessel.

The facts of the case as stated by the Judge of the Small Cause Court are as follows :—(His Lordship here read the case as stated and the questions proposed for the decision of the Court and proceeded) : By the first of these questions I understand the Judge

1872.

W. NICOL AND
COMPANY
vs.
J. S. CASTLE.

1872.

W. NICOL AND
COMPANY
vs.
J. S. CASTLE.

as asking whether, upon the proper construction of the bill of lading, it amounts to an admission by the master that fifty tons of coal were shipped on board.

The answer to this question depends upon the effect to be given to the words "weight, contents, and value unknown" contained in the printed conditions at the foot of the bill of lading in qualifying the amount of coal inserted in writing. Now, the rule of evidence, when the instrument consists partly of a printed formula, such as a bill of lading, and partly of written words, was laid down by Lord Ellenborough in *Robertson vs. French*.⁽¹⁾ He says, speaking of policies of assurance: "The only difference between policies of assurance and other instruments in this respect is that the greater part of the printed language of them, being invariable and uniform, has acquired from use and practice a known and definite meaning and that the words superadded in writing (subject indeed always to be governed in point of construction by the language and terms with which they are accompanied) are entitled nevertheless, if there should be any reasonable doubt upon the sense and meaning of the whole, to have a greater effect attributed to them than to the printed words, inasmuch as the written words are in the immediate language and terms selected by the parties themselves for the expression of their meaning, and the printed words are a general formula adapted equally to their case and that of all other contracting parties upon similar occasions and subjects."

This rule is commented on by Blackburn, J., in *Gumm vs. Tyrie*.⁽²⁾ He says: "Then with regard to the words that are printed I quite agree with my brother Crompton, and I do not agree with the proposition that Mr. Lush puts his case upon, that the words so printed are to be treated less as part of the contract than the other words, because they are printed. I think where there are mere formal and general words which are always put into contracts and are customary terms, and there are other special and peculiar words, I think when one is to overpower the other and to have most weight, that probably we should say that the special terms which a man has invented for himself and put into the contract have been more considered and more thought of than those] merely ordinary words, and no doubt these

(1) 4 East, 136.

(2) 33 L. J. Q. B. 111.

printed forms are customary and consequently the written terms would be more considered by him, and, if they conflict and cannot be reconciled, then the written terms, those more special terms thought of by himself, may be considered to be more thought of and consequently to have more weight by him."

The question then is, whether the two parts of this instrument are irreconcilable, or whether, on the contrary, the bill of lading admits of a reasonable explanation as a whole. Now, it results from the evidence that coals are, in the usual course of trade, shipped on board vessels at Sunderland in the following manner. The coals are weighed in the trucks at some little distance from the ship and are thrown into the ship's hold by the trucks being run on to a stage projecting over the vessel. The master, whose place is necessarily on his vessel receiving cargo, may well refuse to guarantee the exact weight of coal shipped, and the whole of the bill of lading may, therefore, be reasonably and fairly read as meaning that fifty tons have been received on board as represented to the master by the shippers, but that he must not be understood as speaking from his personal knowledge or giving any undertaking that such is the exact amount. In *Jessel vs. Bath*,⁽¹⁾ on which the Judge of the Small Cause Court relies, the bill of lading stated that a certain quantity of manganese had been shipped on board to be delivered at Swansea, the amount being in written words. At the foot of the bill of lading were the printed words "Weight, contents, and value unknown," and both the Chief Baron and Mr. Baron Martin expressed a clear opinion that the written and printed words were reasonably and fairly reconcilable.

In the present case there are the additional circumstances which make the meaning even clearer than in the case cited. First—That the words "weight, contents, and value unknown" are distinctly connected as a qualification with the written words by the latter being immediately followed by the words "to be delivered subject to the exceptions and conditions at foot hereof," and Second—That the signature itself is accompanied with the words "weight unknown" in writing.

In *Haddow vs. Parry*,⁽²⁾ which was an action upon a policy of insurance upon specie or bullion, a bill of lading was offered in evidence to prove that the goods had been shipped on board His

1872.

W. NICOL AND
COMPANY
VS.
J. S. CASTLE.

(1) L. R. 2 Ex. 267.

(2) 3 Taunton, 303.

1872.

W. NICOL AND
COMPANY
TS.
J. S. CASTLE.

Majesty's schooner the "Rook," Captain Lawrence, and which was afterwards captured on her passage home. In the margin of the bill of lading was written, "Bill of lading for 12,000 dollars, dated 12th August 1808," under which were copied the marks of the several chests and their numbers and contents describing them as containing 2,000 dollars each. The body of the bill of lading expressed to be shipped, in good order, six boxes containing 12,000 dollars, being marked and numbered as in the margin, and it was signed "Contents unknown: James Lawrence, Lieutenant." It was held that the words "contents unknown" rendered the bill of lading no declaration of what the chests of dollars contained, and it was therefore no evidence. And so here the very form of signature might, by itself, be well deemed sufficient to render the bill of lading no declaration by the master of the amount of coal shipped.

We can entertain no doubt, therefore, that the printed formula and the written words are, in this case, reconcileable, and that the bill of lading as a whole admits of a reasonable explanation. Our answer to the first question should therefore, in my opinion, be in the negative.

The answer to the second question turns upon the construction to be put on the Indian Bill of Lading Act IX of 1855. The English Act on the same subject, 18 and 19 Viet. c. 111, of which the Indian Act is a literal copy, has come under the consideration of the English Courts of Law on several occasions, but never, so far as we are aware, except incidentally, on the point on which this case turns, namely, the liability of the master signing the bill of lading to a consignee for value under section 3 of the Act.

Section 1 gives a consignee of the goods or indorsee of the bill of lading (to whom the property is intended to pass) the same rights of suit as if the contract had been with himself, and therefore, in the present case, as the bill of lading does not amount to an admission by the master that fifty tons of coal were shipped on board, the plaintiff could not, as a simple consignee of the coal, recover, under that section, against the master, without proving that the fifty tons were actually shipped.

Section 3, however, places a consignee of the goods or indorsee, who has given value, in a far better position as regards the master or other person signing the bill of lading. It says that in their

hands the bill of lading representing goods to have been shipped on board shall be conclusive evidence of such shipment as against the master or other person signing the bill of lading, notwithstanding that such goods or some part thereof may not have been so shipped, unless the holder of the bill of lading shall have had actual notice, at the time of receiving the same, that the goods had not, in fact, been laden on board, and leaves only one ground of defence open to the person so signing the bill of lading to plead, namely, that the misrepresentation was caused without his default and wholly by the fraud of the shipper.

The first important question, then, is—What was the amount of coal which this bill of lading represented as having been shipped? Did it represent to third persons who might deal with the shipper that the exact amount of fifty tons of coal had been shipped? If the written and printed words are reconcilable, as they must be taken to be for the purposes of this argument, we are at a loss to see on what ground it can be contended that the bill of lading, taken as a whole, represents to the public as a fact, on which they may rely, that fifty tons of coal had been shipped. Undoubtedly the bill of lading commences by representing that there have been shipped on board the steam-ship “Hutton” fifty tons of coal, but the “representation” referred to in section 3 must, we think, mean the representation made by the whole instrument. This appears from the preamble, which says, Whereas it frequently happens that the goods in respect of which bills of lading purport to be signed have not been laden on board, and it is proper that such bills of lading in the hands of a *bona-fide* holder for value should not be questioned by the master or other person signing the same on the ground of the goods not having been laden.

Here, however, the bill of lading does not purport to be signed by the master in respect of fifty tons of coal exactly. The object is to protect the *bona-fide* holder without notice, and to make those persons liable who have represented to him through the bill of lading that a certain amount of goods have been shipped. Here, however, the bill of lading gives him clear notice that the master, upon whose signature he is supposed to rely, does not admit that fifty tons were shipped. This conclusion follows irresistibly from the previous decisions as to the effect of the printed condition on the written words.

1872.

W. NICOL AND
COMPANY
VS.
J. S. CASTLE.

1872.

W. NICOL AND
COMPANY
vs.
J. S. CASTLE.

If they are reconcilable and the bill of lading admits of a reasonable and fair explanation, it cannot be said that the bill of lading was signed by the master in respect of fifty tons of coal. But it was said that the Act prevents the master from guarding himself against the effect of the written words, or in other words, the object of the Act was to throw on him as between himself and *bona-fide* holders the obligation of ascertaining the truth of the "written words." But this would be to put a construction on the Act far beyond the object as stated at length in the preamble, and would, in our opinion, require distinct words to that effect, words which are certainly not to be found in this Act.

This view of the Act is adopted by the Chief Baron and Mr. Baron Martin in the parallel case of *Jessel vs. Bath*, already cited, although it was not necessary to decide the question, as the action was against a person who had not signed and who was held by the Court not to be bound by the person signing. They both, however, expressed an opinion that no action could have been brought on the bill of lading under section 3 of the Act, even against the person signing.

We are of opinion, therefore, that the second question should also be answered in the negative. Costs of reference to be paid by the plaintiff.

Attorneys for plaintiffs—*Rimington, Hore, and Langley*.

1873.

April 19.

JOHN GRAHAM AND OTHERS, PLAINTIFFS, versus HILL,
DEFENDANT.*

*Bill of lading—Construction of exceptions—Leakage—Breakage—
Damage caused to goods by leakage from other goods.*

Piece-goods were carried from London to Bombay under a bill of lading, the exceptions in which protected the master from "leakage, breakage, rust, decay, loss or damage from machinery, boilers, misfeasance, error in judgment, negligence or default of persons in the service of the ship and the ship not being liable for any consequences of causes therein excepted, however originating."

The piece-goods on their arrival in Bombay were found to be damaged by oil and by chafing, *i. e.*, by rubbing against other goods in the hold, but there was no evidence to show how such damage was occasioned.

Held, that the term "leakage" did not include leakage from other goods on to the piece-goods, nor did "breakage" include damage caused by chafing, and that, as no negligence was proved, the master was not protected by the exception "damage from negligence."

* Reported at 10 B. H. C. R. 60.

CASE stated for the opinion of the High Court, under section 7 of Act XXVI. of 1864, by John O'Leary, First Judge.

1. In this case the plaintiffs sought to recover from the defendant Rs. 538 as compensation for damage done to the goods of the plaintiffs forming portion of the cargo of the ship "St. Olaf" on a voyage from Europe to Bombay.

2. The goods were what are commonly known as piece-goods. The damage alleged to be caused to one bale was to the extent of Rs. 443-12, by oil having come in contact with the bale, and damage to several other bales to the amount of Rs. 94-8 by "chafing," that is by the bales rubbing against other portions of the cargo near them.

3. The defence was that the defendant was exempted from liability as to each kind of damage by certain clauses in the bill of lading.

4. No evidence was adduced by either the plaintiffs or the defendant as to the particular circumstances under which the damage was caused, but it was not denied that the damage occurred during the course of the voyage, and the amount of damage was not disputed by the defendant.

5. It was contended for the defendant that the damage caused by oil came under the exemption of 'leakage' in the bill of lading and also under the head of 'perils of the seas.'

6. It was contended that the damage caused by chafing came under the head 'perils of the seas' and 'breakage.'

7. A considerable amount of evidence as to the custom of the port of Bombay was given for the plaintiffs, the result of which was that under bills of lading similar to the present one, it is the custom for ships to be responsible for such damages, but that hitherto the amount of such damage in any one case has been very small, and has in no case known to the witnesses equalled in amount that claimed in the present case.

8. I was of opinion that in cases like the present, independently of any custom of the port, the ship is liable for damage like the present, unless it be provided in the bill of lading, or other contract between the parties, that the ship shall be exempt, and I was of opinion that oil damage suffered by piece-goods did not come under the head of leakage, and that there was no evidence that it was

1873.
JOHN
GRAHAM
vs.
HILL.

1873.

JOHN
GRAHAM
vs.
HILL.

occasioned by 'perils of the seas' in the present case; and the bill of lading did not exempt the ship from liability.

9. I was of opinion that 'chafing' did not come within the exception as to breakage, and that there was no evidence that it was caused by 'perils of the seas' and that the bill of lading did not exempt the ship from liability. I found a verdict for the plaintiffs for the amount claimed contingent on the opinion of the High Court as to whether the defendant was liable or was exempt as aforesaid.

The bill of lading referred to in the case, so far as it is necessary to set it out, was as follows:

"Shipped in good order and condition by William Graham and Company in the steam ship 'St. Olaf,' whereof is master for this present voyage Hill, lying in the port of London and bound for Bombay (having liberty to call at any port or ports &c.), five hundred and seventy-five packages merchandise, being marked and numbered as per margin and to be delivered in the like good order and condition from the ship's deck (where the ship's responsibility shall cease) at the aforesaid port of Bombay or so near thereto as she may safely get, the act of God, the Queen's enemies, pirates, robbers by land or sea, restraint of princes, rulers or people, vermin, rain, spray, insufficient packing, inaccuracies, absence of marks, numbers, address, or description of goods shipped, *leakage, breakage, rust, decay, loss or damage from machinery, boilers, or steam however caused, or from collision, stranding, or wreck however caused, or from explosion, heat, or fire on board, in hulk or craft, or on shore however caused, or from evaporation or smell from other goods, jettison, barratry, misfeasance, error in judgment, negligence or default of pilot, master, mariners, engineers, or other person in the service of the ship whether in navigation of the ship or otherwise, risk of craft, or hulk, or transhipment, and all and every the dangers and accidents of the seas, land, and rivers, and of navigation of whatsoever nature or kind being excepted, and the ship not being liable for any consequences of causes herein excepted however originating, nor liable for incorrect delivery unless each package shall have been distinctly marked by the shippers before shipment with the name of the port of destination (in letters not less than two inches long) unto Messrs. W. and H. Graham and Company or to his or their assigns."*

The case was argued on the 19th of April 1873 before Westropp, C.J., and Sargent, J.

Anstey and Farran for the defendant—It is now well established law that the master of a vessel can, by special agreement, completely limit his liability in respect of damage caused to, or loss of, goods which he contracts to carry, and the Court will not go into the question of the reasonableness or the unreasonableness of the

contract : *Phillips vs. Clark*,⁽¹⁾ "*The Duero*,"⁽²⁾ *Tanbuan vs. Pacific Steam Navigation Company*.⁽³⁾ That being so, the only question is—Are the exceptions in the bill of lading wide enough to cover the damage caused to the piece-goods in the present case? (1) There is no reason why "leakage" should be limited to loss by leakage from the goods carried. It will include in its natural sense damage caused to goods (*e. g.* piece-goods) by leakage from contiguous goods. The cases of *Ohrloff vs. Briscall*,⁽⁴⁾ *Czech vs. Steam Navigation Company*,⁽⁵⁾ show that the Courts give an extended meaning to the term "leakage." (2) The exception "damage from negligence, however originating," also protects the master. If negligence in stowing the cargo will, under circumstances like the present, not be presumed, the injury must fall under the exception "perils of the seas," but the Court, we contend, will presume negligence. It is only on the assumption that there has been negligence that the plaintiffs can recover, but by the exception the master is protected from the consequence of negligence.—(WESTROPP, C.J.—This is an action of contract not of delict. It is for the defendant to show that he is within the exceptions.)—The concluding words "however originating" extend the term "damage by negligence" and render it equivalent to the general term "damage" which protected the master in *Ohrloff vs. Briscall*. Breakage includes "chafing." By chafing, minute particles of the piece-goods are in fact broken.

"*The Freedom*,"⁽⁶⁾ *Peninsular and Oriental Steam Navigation Company vs. Shand*,⁽⁷⁾ and *McCawley vs. The Furness Railway Company*⁽⁸⁾ were also cited.

Macpherson for the plaintiffs—All the cases cited—*Phillips vs. Clark* and "*The Duero*"—are cases in which the leakage was of the plaintiffs' own goods and for the loss occasioned by such leakage the suits were brought. I have not been able to find a single case like the present where exemption was claimed under an exception of leakage from liability for damage done to goods by the leakage from other goods, and "*The Nepoter*"⁽⁹⁾ points to an opposite conclusion to that contended for by the defendant. When the master intended

1873.

JOHN
GRAHAM
vs.
HILL.

(1) 2 C. B. N. S. 156.

(2) L. R. 2 Ad. & Ec. 393.

(3) Asp. M. L. C. 336.

(4) L. R. 1 P. C. 231.

(5) L. R. 3 C. P. 14.

(6) L. R. 3 P. C. 595.

(7) 3 Moo. P. C., N. S., 272.

(8) L. R. 8 Q. B. 57.

(9) L. R. 2 Ad. & Ec. 375.

1873.

JOHN
GRAHAM
v. S.
WILL.

to protect himself from damage done by other goods to the goods mentioned in the bill of lading, he did so expressly: see the exception as to damage caused by "evaporation or smell from other goods." It would have been easy to insert the word "leakage" if damage like the present was intended to be excepted. The maxim *Expressio unius alterius exclusio* applies. The bill of lading will be construed most strongly against the master of the ship as it is his document. If it is ambiguous, the custom of the port will be admitted in evidence to explain it: Leake on Contracts, pages 110 and 111, where the cases are cited. Then as to negligence, it is admitted that the master can contract so as to exempt himself from liability in respect of damage caused by it, but then if he relies upon such an exception he must prove negligence. It was not for the plaintiff to prove negligence and so put himself out of Court. The Court will not presume negligence, as the oil may have reached the bales in many ways without there having been negligence on the part of the master or crew. This is an action founded on contract, therefore proof of the shipment of our goods in good order and of their receipt by us in bad order is sufficient to entitle us to recover, unless the master shows some defence founded on the exceptions in the bill of lading. "*The Freedom*" (*supra*), "*The Duero*" (*supra*), and *Tronson vs. Dent*.⁽¹⁾

Anstey in reply—In "*The Nepoter*" the damage was held not to have occurred from leakage but from evaporation. It has not been shown that the master was aware of the alleged custom of the port of Bombay when he signed the bill of lading. Evidence of such custom therefore, even if it existed, cannot be admitted to explain the bill of lading: *Kirchner vs. Venus*.⁽²⁾

WESTROPP, C.J.—This is an action upon the contract contained in a bill of lading which states that the goods comprised in it were shipped in good order and condition and were to be delivered, one bale of piece-goods having been damaged by oil and other bales having been injured by chafing. The goods, then, not having been delivered in accordance with the conditions of the bill of lading, it lay on the defendant to prove that the damage sustained by the goods came within the exceptions contained in the bill of lading or some of

(1) 8 Moo. P. C. 419.

(2) 12 Moo. P. C. 361.

them. As to the damage by oil it was first contended, on the part of the defendant, that the case came within the term "leakage," but we think that argument is not maintainable. The term "leakage" in the bill of lading is, in our opinion, applicable only to the goods comprised in that bill, and does not extend to damage caused to such goods by leakage from other parts of the cargo.

The defendant next contends that he is protected by the word "damage" being amongst the exceptions, but the term "damage" is especially restricted by the words which follow it. Those words are, "from machinery, boilers, or steam however caused, or from collision, stranding, or wreck however caused, or from explosion, heat, or fire . . . however caused, or from evaporation, or smell from other goods, jettison, barratry, misfeasance, error in judgment, negligence or default of pilot, master, mariners, engineers, or other persons in the service of the ship whether in navigation of the ship or otherwise, risk of craft, or hulk, or transshipment." It is manifest that the damage in respect of which the master is protected, is damage arising from these enumerated causes and not damage generally, but then it is said that these restrictions on the kind of damage are got rid of by the last words "the ship not being liable for any consequences of causes . . . however originating," but the expression used is not "consequences of causes however originating" but consequences of causes *herein excepted* however originating, and we think that the words "however originating" refer only to the causes excepted in the bill of lading, that is (when applied to damage) damage of the kind distinctly excepted in the bill of lading and (when applied to leakage) leakage of the kind excepted in the bill of lading, leakage from the goods carried under the bill of lading, however that leakage may originate.

One stipulation in the bill of lading strongly supports the conclusion we have arrived at: it is that damage from evaporation or smell from other goods is expressly provided for. When the master intends to protect himself from damage caused in a particular way by other goods to the goods carried he uses apt words to effect that purpose.

Then as to the injury caused to the piece-goods by chafing, we think that that does not come within the exception "breakage." It is not stated in the case that the goods have been cut or that

1873.

JOHN
GRAHAM
vs.
HILL.

1873.

JOHN
GRAHAM
vs.
HILL.

their continu'ity has been severed. What the case describes is chafing by rubbing by the bales rubbing against other portions of the cargo near them. We have arrived at our decision on this point with some doubt, but on the whole we are of opinion that chafing of the kind described by the learned Judge of the Small Cause Court does not come within the exception. Lastly, there is no proof of negligence, and it was for the master, if he could, to prove that the case came within the exception in the bill of lading. We are, therefore, of opinion that the Judge has come to a right decision, and that judgment was properly given in favour of the plaintiffs. The plaintiffs must have their costs. In deciding this case we must not be understood as basing our judgment in any degree upon what the Judge has stated with reference to the custom of the port.

Attorneys for plaintiffs—*Hearn, Cleveland, and Peile.*

Attorneys for defendant—*Rimington, Hore, and Langley.*

1874.
June 25.

LADKIBA'I, WIDOW, AND VASANJI HURJI, LEGAL
REPRESENTATIVES OF HURJI KESSOWJI, PLAINTIFFS, versus
MADHAVJI GHELLA, DEFENDANT.

Assignment of debt by word of mouth—Validity.

On Hurji and the defendant making up their accounts the defendant was found to be indebted to Hurji in the sum of Rs. 762-6-2. Hurji then told the defendant to pay Rs. 700 to Náthji for a temple of which Náthji was manager. The defendant promised to pay Náthji Rs. 700 out of the moneys due by him to Hurji. The defendant failed to pay Nathji the Rs. 700, although demands were made upon him. On a suit by the widow of Hurji to recover the sum of Rs. 762-6-2,

Held, that there had been a valid assignment of the Rs. 700, and that she could not recover that amount.

CASE stated for the opinion of the High Court under section 7 of Act XXVI. of 1864.

1. The plaintiffs in this case claimed as such legal representatives as aforesaid from the defendant the sum of Rs. 838-12-0, being the balance of an account due from the defendant to them as such legal representatives for moneys lent and advanced by Hurji Kessowji in his lifetime to the defendant.

2. The case was tried before me on the 8th and 13th days of October 1873.

3. The defendant admitted that a sum of Rs. 762-6-2 was due from him to Hurji Kessowji in Vaisak sud Samvat year 1929, but in that month Hurji Kessowji passed a transfer for Rs. 700, part of the sum of Rs. 762-6-2, in favour of the Sunti Nathji temple, and that he the defendant had promised to pay the trustees of that temple such sum of Rs. 700 and was liable to them for that amount, and that he the defendant was ready and willing to pay the plaintiffs the balance of Rs. 62-6-2 and the interest thereon. The facts proved before me were, that Hurji Kessowji was in the habit during his lifetime of frequently visiting and performing his morning ablutions at the temple of Sunti Nathji at Mahálakshmi and had made money gifts to that temple; that at the beginning of Vaisak sud in the Samvat year 1929, Hurji Kessowji was desirous of erecting a silver seat and covering for a certain image in that temple; that about the 29th day of April 1873, the defendant and his mehtá attended with their books on Hurji Kessowji at Mahálakshmi, where they met Narotumdás Pranvalubdás, one of the managers of the Sunti Nathji temple, Hurji Kessowji's mehtá, and other persons. The books of the defendant and the books of Hurji Kessowji were compared by their respective mehtás and a sum of Rs. 762-6-2 was found to be due from the defendant to Hurji Kessowji. Hurji Kessowji then told the defendant to pay to Narotumdás Pranvalubdás Rs. 700 for the temple out of the moneys so due. The defendant then promised Narotumdás Pranvalubdás to pay him Rs. 700 out of the balance due to Hurji Kessowji. No entries were made in the books of Hurji Kessowji or of the defendant as to this agreement, and the defendant has made no entry since in his books in respect of the said Rs. 700. Demands were afterwards made by Narotumdás Pranvalubdás on the defendant for payment of the Rs. 700, and the defendant from time to time promised to pay the same, but the same still remains unpaid. Hurji Kessowji died on the 6th day of June 1873. Mr. Remington contended on behalf of the plaintiffs that there was no legal transfer by Hurji Kessowji of the said sum of Rs. 700 to the Sunti Nathji temple, as no entry had been made in the books of Hurji Kessowji or the defendant of such transfer; that there was only a bare intention on the part of Hurji Kessowji to make such transfer; that if it was a gift by Hurji Kessowji to the Sunti

1874

LADKIBÁI
VS.
MADHAUJI
GHELLA.

1874.
 LADKIBAI
 vs.
 MADHAUJI
 GHILLA.

Nathji temple, it was not a valid gift according to Hindu law as the money itself had not been delivered over at the time by Hurji Kessowji to Narotumdás Pranvalubdás, and cited the case of *Hurjiwun Anundram vs. Narron Haribhai*, 4 B. H. C. R. (A. C. J.) 37. On the 17th of October 1873, I delivered my judgment, and held that it was a valid assignment by Hurji Kessowji of the Rs. 700 on the 29th day of April 1873 to Narotumdás Pranvalubdás as the manager of the Sunti Nathji temple. That it was not necessary that any entry of such assignment should have been made in the books of Hurji Kessowji or the defendant. That it was a good gift as Hurji Kessowji had done everything that was necessary to make the assignment of the Rs. 700 valid. He had caused the defendant to promise to pay to Narotumdás Pranvalubdás the Rs. 700, and after that promise the defendant was liable to Narotumdás Pranvalubdás as such manager for that amount. I gave a verdict for the plaintiffs for Rs. 62-6-2 with interest thereon at 9 per cent from the 29th day of April 1873 to the 19th day of September 1873, and costs. The judgment at the request of the plaintiffs was made contingent on the opinion of the High Court on the question whether on the above facts the plaintiffs as such legal representatives were entitled to recover the said sum of Rs. 700 from the defendant.

JUDGMENT OF THE HIGH COURT (Sir M. Westropp, C.J.,
 and Bayley, J.)

On the facts stated in the said case the plaintiffs as such legal representatives were not entitled to recover the sum of Rs. 700 from the defendant.

NANABHAI CURSETJI & Co., PLAINTIFFS, versus HAJI HUSSAIN
MITHA AND ANOTHER, DEFENDANTS.

1874.
Sept. 18.

*Contract of sale—Goods lying at French Port to be delivered there—French or
English measurement.*

By a contract made in Pombay the defendants agreed to sell to the plaintiffs, "at the price of Rs. 14-12 per ton, about 3,000 tons of coal more or less now lying at Mahé and to give delivery thereof at that port."

Held, that the plaintiffs were only entitled to receive 3,000 tons, more or less, by French measurement, that is to say, tons of 1,000 kilogrammes each.

CASE stated for the opinion of the High Court under section 7 of Act XXVI. of 1864.

1. The sole question in dispute was as to the effect of an agreement dated 1st August 1872, whereby defendants agreed to sell to plaintiffs "at the price of Rs. 14-12 per ton, about 3,000 tons of coal more or less now lying at Mahé, and give delivery thereof at that port."

2. The plaintiffs got delivery of the coal and paid for it at the contract rate of Rs. 14-12 per ton, and after having done so, they discovered that the quantity of coal delivered was 3,000 "French tons" of 1,000 kilogrammes, whereas plaintiffs contended that they were entitled to receive 3,000 English tons of 2,240 lbs. avoirdupois.

3. The kilogramme being equal to 2·20462 lbs. avoirdupois, it will be seen that the plaintiffs got considerably less than 3,000 tons English.

4. It was stated that 1,018 kilogrammes make one ton English, but it is not necessary to go into any calculation, as it was fully admitted that if the plaintiffs were entitled under the agreement to 3,000 tons of 2,240 lbs., they were now entitled to get from the defendants the amount claimed in this suit.

5. The only facts laid before me for the purpose of construing the agreement were, — first, the admitted facts that Mahé is French territory; second, that plaintiffs at the time of the purchase knew that Messrs. Baudry & Co. of Bombay, as agents for a French firm, had sold the coal to defendants; and, third, a fact which was proved in evidence, that in France and in the territories subject thereto, there is a well known measure of weight, namely a "ton" consisting of 1,000 kilogrammes.

6. I was inclined at first to hold that the contract being in

1874.

NANABHAI
CURSETJI
vs.
HAJI HUS-
SAIN MITHA.

English and made between two British subjects in British territory, should be construed with reference to the weight known in England as a ton. The case, however, of *Scott vs. Bevan* (2 B. & Ad. 78), was cited to me from Chitty on Contracts, 7th Edition, page 92, and from Story's Conflict of Laws, sec. 272 (a). I was unable to see the case in the original report, but the proposition as cited seemed to approach very much in principle to the present case, and on the authority of that case I gave judgment for the defendants and made no order as to costs. This judgment, at the request of plaintiffs, was made contingent on the opinion of the High Court on the question whether under the contract the vendee was entitled to receive 3,000 tons (more or less) English weight or only 3,000 tons (more or less) of 1,000 kilogrammes each.

ORDER OF THE HIGH COURT (Sir M. Westropp, C.J.,
and Sir Charles Sargent, J.)

This Court doth pass judgment for the defendants, and doth order and decree that the plaintiffs do pay to the defendants the costs of reserving the question and stating it for the opinion of this Honourable Court and otherwise arising thereout or connected therewith.

1874.
Nov. 27.

VITHOBA LAXUMON, PLAINTIFF, versus GANGABAI, DAUGHTER
OF RAM SAVANT, DEFENDANT.

*Contract—Liability of Hindu married woman living apart from her husband
and earning her own livelihood.*

A Hindu married woman of the Sudra caste, whose husband is absent or has separated from her and who earns her own livelihood by labour or trade, is liable to be sued on contracts entered into by her.

CASE stated for the opinion of the High Court under section 55 of Act IX. of 1850.

1. The plaintiff in this case sued on a promissory note alleged to have been made by the defendant on the 31st of March 1872.

2. The defences were (1) a denial of the making of the note and (2) coverture.

3. On the evidence I found that the defendant did make the note sued upon.

4. As to the second plea the defendant is a Hindu woman of the Sudra caste, her husband (by *lagan*) emigrated as a labourer to Mauritius about twelve years ago and has been there ever since. He was alive when last heard of a few months ago.

5. The defendant earned her own livelihood as an overseer of women employed in a spinning factory, and has from her earnings acquired property in Bombay. The money was borrowed from the plaintiff to pay off other parties to whom defendant was indebted.

6. I overruled the plea of coverture and gave judgment for the plaintiff, but as the defence is one which is frequently raised in this Court and on which it is desirable to obtain the decision of the High Court, my judgment was given subject to the opinion of their Lordships on the following questions :

(1) Is a Hindu married woman of the Sulra caste, whose husband is absent or has separated from her and who earns her own livelihood by labour or trade, liable to be sued on contracts entered into by her ?

(2) If she is, can her person be taken in execution ? *

JUDGMENT OF THE HIGH COURT (Sir C. Sargent, Acting C.J.,
and Bailey, J.)

The questions put in the case stated should be answered in the affirmative.

RUTTONJI ASPANDIARJI, PLAINTIFFS, versus SENNA SELLA
AND OTHERS, DEFENDANTS.

Hindu Law—Landlord and tenant—Mortgage by Hindu—Right of purchaser under the mortgage to claim entire rent from tenants against an undivided son of the mortgagor where there has been no partition.

Defendants were tenants of a portion of a house belonging to M., a Hindu. M. mortgaged the house to G., who sold under the power of sale contained in the mortgage to the plaintiff. The plaintiff gave notice to the tenants to pay rent to him in future. M. had a son, in whom on his birth an undivided moiety of the house vested in interest but not in possession. The son had attained his majority after the purchase by the plaintiff but had not proceeded to a partition. In a suit by the plaintiff to recover from the defendants the entire rent due by them, it was contended on behalf

* Note.—Under section 245A of the Civil Procedure Code no woman is now liable to arrest or imprisonment in execution of a decree for money.

1874.

VITHOBA
LAXUMON
vs.
GANGABAI.

1874.

April 30.

1874.

RUTTONJI
ASPANDIARJI
vs.
SENNA SELLA.

of the defendants that the plaintiff was entitled only to a moiety of such rent, the son being entitled to the other moiety.

Held, that under the circumstances the plaintiff was entitled to recover the entire rent.

CASE stated for the opinion of the High Court, under section 55 of Act IX. of 1850, and section 7 of Act XXVI. of 1864.

1. In this suit the plaintiff seeks to recover from the defendants the sum of Rs. 525 for the use and occupation of part of a house situated in Nagdevi Street, without the Fort, and assessed under No. 114.

2. The facts of the case are as follows :—The defendants were on the 2nd of May 1870, and long prior to that date, in occupation of the premises for which rent is claimed as tenants to one Murlidhur Udhawji.

3. On the 2nd of May 1870 Murlidhur Udhawji mortgaged the house in question to Gulam Mahomed Cassamally.

4. Murlidhur Udhawji having failed to pay the mortgage-debt, Gulam Mahomed, under the power given to him by the mortgage-deed, sold the house by public auction, and it was purchased by the plaintiff, to whom it was conveyed by the mortgagee by an indenture dated 31st of August 1871.

5. On the 18th of September 1871 the plaintiff gave notice of his purchase to the defendants, and required them, for the future, to pay their rent to him, and not to Murlidhur Udhawji, the mortgagor.

6. After the plaintiff purchased the house he brought an action of ejectment in the High Court against Murlidhur Udhawji, the mortgagor, Bái Jumna, widow of Udhawji Kaku, his mother, and Dulabdas Murlidhur his son, who was then an infant and was represented by his guardian.

7. From the decree passed by the Division Court in this action, the plaintiff appealed. The Appellate Court varied the decree of the Division Court. It is admitted that before the decree of the Appellate Court was pronounced, the son Dulabdas Murlidhur had attained his majority, but this fact was not brought to the notice of the Court, and consequently no amendment was made in the record.

8. By this decree it is declared *inter alia* that the plaintiff is entitled absolutely to the moiety or half share of Murlidhur

Udhowji (the mortgagor) in the house, and that so long as the said Murlidhur Udhowji shall live, or until his son Dulabdás Murlidhur (in whom on his birth an undivided moiety of the house vested in interest but not in possession) shall become by law entitled to insist upon a partition of the house, the plaintiff shall be entitled to the possession and enjoyment of the whole of the house, and the rents and profits thereof, and that on the death of the said Murlidhur Udhowji or whenever his son Dulabdás Murlidhur shall by law become entitled to insist upon a partition, he Dulabdás Murlidhur shall be entitled to the possession and the enjoyment of the other moiety of the house, and the rents and profits of such moiety absolutely.

9. The present suit is brought to recover rent from the defendants from the date of the plaintiff's purchase to the 31st of July last.

10. At the hearing it was admitted by the defendant's advocate that the plaintiff was entitled to all the rent payable by the defendants from the date of the purchase to the time when the son Dulabdás Murlidhur became "by law entitled to insist upon a partition of the house," but it was contended that from that time the plaintiff's title to a moiety of the rents had determined, and that for the rent due for the subsequent period Dulabdás Murlidhur should either be joined as co-plaintiff or a decree passed for the plaintiff for a moiety of the rent only, and evidence was offered for the purpose of showing that the plaintiff's right to recover in this suit was barred by reason of Dulabdás Murlidhur having attained his majority and by the happening of events which by law would entitle him to insist upon a partition of the house.

11. For the plaintiff it was argued that the defendants were the tenants of Murlidhur Udhowji at the date of the mortgage; that Murlidhur's right as landlord passed by the mortgage and sale to the plaintiff; that the defendants could not dispute the plaintiff's title; that independently of the decree of the High Court, the plaintiff, as assignee of the rights of Murlidhur, was entitled to the entire rent; that if Murlidhur Udhowji had not mortgaged the house and was now suing for rent the defendants could not set up the title of his son Dulabdás (in whom on his birth an undivided moiety of the house vested in interest but not in possession), and could not set it up in a suit by Murlidhur's assignee; that the decree of the High

1874.

RUTTONJI
ASPANDIARJI
vs.
SENNA SELLA.

1874.

RUTTONJI
ASPANDIARJI
vs.
NENNA SELLA.

Court was simply declaratory of the rights of the parties to that suit and was not intended to affect the plaintiff's rights as assignee of the landlord; that assuming it could now be established that the son Dulabdas Murlidhur was in a position to insist upon a partition evidence to that effect was not admissible in this suit; and that until Dulabdas had instituted a suit and had obtained a decree for a partition of the house the plaintiff was entitled to recover the entire rent payable by the defendants.

12. I concurred in the arguments of the plaintiff's advocate. I held that until Dulabdas the son of the mortgagor had obtained a decree for a partition, the plaintiff as assignee of Murlidhur Udhowji was entitled to recover the entire rent. I declined to take the evidence offered to show that Dulabdas was by law entitled to insist upon partition, and gave judgment for the plaintiff for the amount claimed, contingent upon the opinion of their Lordships the Judges of the High Court on the following questions :

(1) Is the plaintiff under the circumstances above set forth entitled to recover the entire rent claimed ?

(2) Is the evidence offered to show that Dulabdas Murlidhur has now by law become entitled to insist upon a partition of the house admissible in this suit ?

(3) If such evidence is admissible and Dulabdas Murlidhur's right to insist on a partition is established, must he be joined as co-plaintiff, or is he and the present plaintiff each entitled to claim a separate moiety of the rent ?

13. It has been agreed by the advocates of the parties to this suit that in the event of their Lordships deciding the second question in the affirmative, the judgment by the Court for the plaintiff shall be set aside and the suit remitted to this Court to take the evidence which has been rejected.

The material portion of the decree of the High Court above referred to was as follows :

This Appellate Court doth vary the decree of the 11th day of November 1872, and doth order that the appellant Ruttonji Aspandiarji, subject to the right of residence and maintenance of the defendant Jumna Bai as allowed by the will of her deceased husband Udhowji Kanku in the plaint mentioned, be declared entitled absolutely to the moiety or half share of the respondent Murlidhur Udhowji in the house in the plaint mentioned and subject as aforesaid that so long as the said Murlidhur Udhowji shall live or until the respondent Dulabdas

Murlidhur (in whom on his birth an undivided moiety of the said house vested in interest but not in possession) shall become by law entitled to insist upon a partition of the said house, the said appellant be and he is hereby declared to be entitled subject as aforesaid to the possession and enjoyment of the whole of the said house and the rents and the profits thereof, but that the same must be kept by him the said appellant in good and tenantable repair, and this Appellate Court doth further declare that on the death of the said respondent Murlidhur Udhowji or whenever the said respondent Dulubdás Murlidhur or his heirs shall by law sooner become entitled to insist upon a partition, that he the said respondent Dulabdas Murlidhur or his heirs (other than and except his father) shall be entitled to the possession and enjoyment of the other moiety of the said house and the rents and profits of such moiety absolutely, subject however as aforesaid to the residence and maintenance of Jum nabái, which right of residence and maintenance of the said Jum nabái, to the extent mentioned in the said will, this Court declares to be well charged upon the whole of the said house so long as the said Jum nabái shall live and remain unmarried.

1874.

RUTTONJI
ASPANDIARJI
vs.
SENNA SELLA.

JUDGMENT OF THE HIGH COURT (Sir M. R. Westropp, C.J., & Green, J.)

We are of opinion upon the first question that the plaintiff under the circumstances set forth is entitled to recover the entire rent claimed.

We understand that the evidence offered was evidence that Dulabdás Murlidhur had attained his majority according to Hindu law, and as the attainment of such majority was not a circumstance which would have entitled him to a partition (a parcener being entitled to a partition, albeit a minor), we are of opinion that the evidence offered was immaterial, and therefore reply in the negative to the second question. A reply to the third question is rendered unnecessary by the reply to the second.

PRATAB DA'JI, PLAINTIFF, versus THE BOMBAY BARODA AND
CENTRAL INDIA RAILWAY COMPANY, DEFENDANTS.*

1875.

Nov. 27.

*Act XVIII. of 1854, section 17—Act XXV. of 1871, section 2—Railway
Company—Ticket—Trespas.*

The plaintiff entered a carriage on the defendants' railway at Surat with the purpose of proceeding to Bombay. By an oversight and without any fraudulent intent, he omitted to procure a ticket at Surat. On arriving at Navsári, he applied to the station-master for a ticket to Bombay, but was refused. He was, however, allowed by

* Reported at I. L. R. 1 Bom. 52.

1875.

PRATAB DÁJI
vs.
THE B. B. &
C. I. RAILWAY
COMPANY.

the defendants' servants to proceed in the same train to Belsár, where he again applied for a ticket and was again refused, but was directed by the defendants' servants to get into the train and not leave it again. At Dáhanu he again got out and applied for a ticket to the station-master. During a discussion between the plaintiff's master and the station-master the plaintiff, at the direction of his master, re-entered the train. Ultimately the station-master refused to give the plaintiff a ticket and ordered him to get out of the train, and on his not complying with this order, sent a sepoy, who forcibly removed the plaintiff from the carriage. In an action by the plaintiff to recover damages for the forcible and illegal removal of the plaintiff from the carriage, and for the illegal detention of the plaintiff at the station at Dáhanu, and for the illegal refusal of the defendants to allow the plaintiff to proceed in the train to Bombay,

Held, First,—that the latter portion of section 2 of Act XXV. of 1871 amending section 1 of Act XVIII. of 1854, which provides for payments to be made by persons failing to produce their tickets when demanded by the servants of the company, applies only to the case of a person who has received a ticket and will not or cannot produce it, and not to a person travelling without having obtained a ticket with no intention to defraud.

Second,—That the absence of a fraudulent intention did not make the entry into the carriage less unlawful, and consequently that the plaintiff started from Surat as a trespasser.

Third,—That the conduct of the railway officials at the stations intermediate between Surat and Dáhanu, if it amounted at all to leave and license to the plaintiff to proceed without a ticket, could only operate as such until the train stopped at the next station.

Fourth,—That there was no legal obligation on the station-master to issue a ticket to the plaintiff to enable him to proceed from Dáhanu.

CASE stated for the opinion of the High Court under section 55 of Act IX. of 1850.

1. In this case the plaintiff sought to recover from the defendants the sum of Rs. 200 as damages for the forcible and illegal removal of the plaintiff from one of the defendants' carriages at Dáhanu station and for illegal detention at the aforesaid station and for illegal refusal of the defendants to allow the plaintiff to proceed in the train to Bombay.

2. The facts as far as they appear material were as follows :—On the 30th June 1874 the plaintiff, who is a sepoy in the service of Tyrrell Leith, Esquire, Barrister-at-Law, was with his master at Surat, and his master being about to proceed by the defendants' railway to Bombay, the plaintiff, in attendance on his master, got into the train at Surat, his master being in another carriage in the same train, and the plaintiff and his master started by the train for Bombay.

3. When the plaintiff got into the train at Surat he had no

1875.

PRATAB DÁJI
vs.
THE B. B. &
O. I. RAILWAY
COMPANY.

ticket nor had any been taken by him or on his behalf by his master or any other person. The omission by the plaintiff to procure a ticket arose from a mere mistake or misunderstanding. There was not, on the part of the plaintiff or his master, at any time any intention of evading the payment of his fare or of travelling without a ticket. In fact the plaintiff supposed that his master had a ticket for him, while his master was under the belief that the plaintiff had his own ticket.

4. At Navsári station the plaintiff for the first time ascertained that his master had no ticket for him. His master immediately provided him with money to buy one, and the plaintiff applied to the station-master at Navsári for a ticket to Bombay, but was refused, on what grounds it does not distinctly appear, but he was permitted by the defendants' servants to proceed with the train without a ticket. When the train arrived at Bulsár the plaintiff again applied for a ticket but again failed to get one, and the guard of the train put him into the carriage and warned him not to get out again as the train stopped a very short time at the station south of Bulsár. On arrival at Dáhánu the plaintiff again got out and applied to the station-master there for a ticket and explained to the station-master how he happened to be without one. An explanation of the matter was also offered by the plaintiff's master to the station-master, who, however, refused to give the plaintiff a ticket. While at Dáhánu and while a discussion was going on between the plaintiff's master and the station-master about the case, the plaintiff's master ordered the plaintiff to get into his carriage and remain there while he (Mr. Leith) would arrange matters with the station-master. There is no doubt, and we find as a fact that the plaintiff was all along ready and willing to pay for his ticket and that at Dáhánu Mr. Leith on behalf of the plaintiff offered to pay any sum that might be demanded (by the station-master) provided plaintiff was given a ticket.

5. The station-master, however, refused to give him one, and finding the plaintiff had gone into the train again, ordered him out, and on the plaintiff not coming out of the carriage, sent a sepoy, who forcibly removed the plaintiff from the carriage.

6. The plaintiff being unable to obtain a ticket from the defendants' servant at Dáhánu and not being allowed to enter the train without one, was left behind at Dáhánu and was practically unable

1875.

PRATAP DÁJI
vs.
 THE B. B. &
 C. I. RAILWAY
 COMPANY.

to go to Bombay before the departure of the next train for Bombay, which involved a detention of twenty-four hours. Before the arrival of the next train he purchased a ticket and proceeded in that train to Bombay.

7. Beyond what is above stated the plaintiff did not allege any damage as having occurred to him, except the injury to his feelings and the inconvenience as to food &c. while at Dáhánu.

8. The case came on for hearing on the 18th and 22nd August and 11th and 18th September 1874 before the then Acting Third (now Fourth) Judge, who on the 23rd of November delivered judgment, finding for the plaintiff damages Rs. 200 and costs, and the Judge certified Rs. 30 as the plaintiff's professional costs.

9. The Judge found that there was a forcible and illegal removal of the plaintiff from the railway carriage and an illegal detention of the plaintiff by the servants of the defendants acting under the orders of the defendants and that such removal and detention was not justifiable.

10. That the defendants were guilty of a breach of duty as carriers in refusing to carry the plaintiff from Surat or Dáhánu to Bombay.

11. That there were no circumstances in the case which could justify the forcible removal and consequent detention of the plaintiff at Dáhánu.

12. That the plaintiff had not contributed to the wrong in such a manner as to preclude him from recovering damages.

13. That the plaintiff did not travel in the railway carriage with the leave and license of the defendants or their servants, and that he was not a trespasser within the provision of section 17 of Act XVIII. of 1854.

14. The defendants obtained a rule *nisi* for a new trial on the grounds stated in the rule.

15. This rule coming on to be argued before the Full Court consisting of the First and Fourth Judges, the Court differed in opinion, and on the 19th day of January 1875 gave judgment; the Fourth Judge holding that the rule should be discharged with costs and the First Judge holding that it should be made absolute.

16. The Fourth Judge adhered to his finding at the original trial and for the reasons set forth in his judgment. He was of opinion

that no new arguments had been advanced to induce him to alter his decision.

17. As there were a great number of circumstances in the case which weighed with the Judge at the trial, and which if fully set forth here would occupy a large space, we beg leave to append a copy of the judgment hereto for reference.

18. The First Judge was of opinion that the rule should be made absolute, because under section 1 of the Railway Act (Act XXV. of 1871), the plaintiff having entered a carriage for the purpose of travelling therein without having first paid his fare and obtained a ticket was, in the opinion of the First Judge, liable to be turned out; and, no more force having been used to the plaintiff than was necessary to compel him to leave the carriage, no assault in law had, in the Judge's opinion, taken place.

19. The First Judge was also of opinion that there was no "illegal detention" at Dáhanu. If so, the only claim of the plaintiff, if any, was against the defendants for a breach of general duty as carriers in not giving him a ticket on tender of the fare, and in not carrying him from Dáhanu to Bombay; and, inasmuch as the plaintiff did not allege any damage to have occurred to him from such breach of duty, the verdict for Rs. 200 could not stand, even supposing (which the First Judge did not admit) that the defendants' servants were under the circumstances bound to give the plaintiff a ticket on tender of the fare at Dáhanu.

20. The Judges so differing, the case is necessarily under section 55 of Act IX. of 1850 referred to the High Court. The question for the High Court being whether the rule *nisi* for a new trial in this case should be made absolute or discharged.

21. The High Court will therefore be pleased to make such order in the premises and as to costs or otherwise as to it shall seem fit.

Farran for the defendants in support of the rule for a new trial—The plaintiff not having a ticket was a trespasser and as such liable to be removed: Act XVIII. of 1854, section 17. There was no waiver of the trespass on the part of the defendants as the guard and porters, who, at Navsári and again at Bulsár, suffered the plaintiff to proceed were acting beyond the scope of their authority in so doing.

1875.

PRATAB DÁJI
vs.
THE B. B. &
C. I. RAILWAY
COMPANY.

1875.

PRATAB DÁJI
vs.
THE B. B. &
C. I. RAILWAY
COMPANY.

At any rate, the plaintiff became a trespasser at Dáhánu in refusing to leave the train when ordered to do so by the station-master. The latter was not bound to receive the fare tendered to him by the plaintiff after the arrival of the train at Dáhánu.

Marriott for the plaintiff—The defendants were bound to convey the plaintiff, and therefore he was no trespasser even at Surat, still less can he be held to be a trespasser after Navsári, whence he proceeded with the express leave and license of the defendants. The plaintiff's obligation to take a ticket is imposed on him by section 2 of Act XXV. of 1871 amending section 1 of Act XVIII. of 1854. This section must be read as a whole, and so reading it the defendants might be justified in exacting the penalty therein prescribed for the violation of its provisions but not in treating the plaintiff as a trespasser. Section 3 of Act XVIII. of 1854 provides only for the case of a passenger travelling without a ticket with intent to evade the payment of his fare, and it is clear that there was no such intent here. The tender of the fare at Dáhánu imposed on the defendants the common law obligation of carriers to carry the plaintiff.

Farran in reply—The leave and license, if any, was determinable at the will of the defendants, and they determined it at Dáhánu. The latter portion of section 2 of Act XXV. of 1871, amending section 1 of Act XVIII. of 1854, applies only to the case of a passenger who has taken a ticket but fails to give it up when required. It would be unreasonable to expect the defendants to issue tickets and accept the tender of a fare whenever and wherever required to do so.

JUDGMENT OF THE HIGH COURT (Sir M. R. Westropp, C.J.,
and Sir C. Sargent, J.)

SARGENT, J.—This matter comes before us on a case stated for the opinion of the High Court under section 55 of Act IX. of 1850 and arising out of an action brought by the plaintiff in the Small Causes Court to recover from the defendants the sum of Rs. 200 as damages for the forcible and illegal removal of the plaintiff from one of the defendant's carriages at Dáhánu station, and for illegal detention at the aforesaid station, and for illegal refusal of the defendants to allow the plaintiff to proceed in the train to Bombay. At the hearing of the cause the Fourth Judge of the Court was of opinion that the defendants had committed the several

illegal acts with which they were charged, and passed judgment for the plaintiff for the full amount of his claim and costs. A rule *nisi* was obtained by the defendants for a new trial and came for argument before the First and Fourth Judges of the Court, who were divided in their opinion; the First Judge being of opinion that there had been no illegal removal of the plaintiff from the carriage nor illegal detention, and that, even supposing (which the learned Judge did not admit) that the defendants' servant was bound to give the plaintiff a ticket on tender of the fare at Dáhanu, still that as the plaintiff did not say he had suffered any damage from the defendants' refusal to give him a ticket, the plaintiff's claim of Rs. 200 could not be supported, and that, therefore, the rule should be made absolute. The Fourth Judge, on the other hand, adhered to the opinion he had expressed at the hearing and held that the rule *nisi* should be discharged. The facts, so far as they are material, are stated in the case as follows:—On the 30th June 1874 the plaintiff, who is a sepoy in the service of Tyrrell Leith, Esquire, Barrister-at-Law, was with his master at Surat, and his master being about to proceed by the defendants' railway to Bombay, the plaintiff, in attendance on his master, got into the train at Surat, his master being in another carriage in the same train, and the plaintiff and his master started by the train for Bombay. When the plaintiff got into the train at Surat, he had no ticket, nor had any been taken by him or on his behalf by his master or any other person. The omission by the plaintiff to procure a ticket arose from a mere mistake or misunderstanding, and there was not on the part of the plaintiff or his master at any time any intention of evading the payment of his fare or of travelling without a ticket. In fact the plaintiff supposed that his master had a ticket for him while his master was under the belief that the plaintiff had his own ticket. At Navsári station the plaintiff, for the first time, ascertained that his master had no ticket for him. His master immediately provided him with money to buy one, and the plaintiff applied to the station-master at Navsári for a ticket to Bombay, but was refused, on what grounds it does not distinctly appear, but he was permitted by the defendants' servants to proceed in the train without a ticket. When the train arrived at Bulsár the plaintiff again applied for a ticket, but again failed to get one, and the guard of the train put him into

1875.

PRATAB DÁJI
vs.
THE B. B. &
C. I. RAILWAY
COMPANY.

1875.

PRATAB DÁJI
vs.
THE B. B. &
C. I. RAILWAY
COMPANY.

the carriage and warned him not to get out again, as the train stopped a very short time at the stations south of Bulsár. On arrival at Dáhánu the plaintiff again got out and applied to the station-master there for a ticket, and explained to the station-master how he happened to be without one. An explanation of the matter was also offered by the plaintiff's master to the station-master, who, however, refused to give the plaintiff a ticket. While at Dáhánu and while a discussion was going on between the plaintiff's master and the station-master about the case, the plaintiff's master ordered the plaintiff to get into his carriage and remain there while he (Mr. Leith) would arrange matters with the station-master. There is no doubt and we find as a fact that the plaintiff was all along ready and willing to pay for his ticket, and that at Dáhánu Mr. Leith, on behalf of the plaintiff, offered to pay any sum that might be demanded by the station-master provided the plaintiff was given a ticket. The station-master, however, refused to give him one, and finding that the plaintiff had gone into the train again, ordered him out, and on the plaintiff not coming out of the carriage, sent a sepoy, who forcibly removed the plaintiff from the carriage. The plaintiff, being unable to obtain a ticket from the defendants' servants at Dáhánu and not being allowed to enter the train without one, was left behind at Dáhánu, and was practically unable to go to Bombay before the departure of the next train for Bombay, which involved a detention of twenty-four hours. Before the arrival of the next train he purchased a ticket and proceeded in that train to Bombay. In this state of facts the important question for determination is whether the plaintiff was in the train at Dáhánu station under the circumstances which constituted him a trespasser. If the company were entitled to regard him as such, then, whether under the express provision of section 17 of Act XVIII. of 1854, or in exercise of the right which the law accords to every proprietor to remove a trespasser, using only such force as may be necessary for the purpose, the defendants were, we cannot doubt, justified in removing the plaintiff from the train. It was contended, however, for the plaintiff that, although section 2 of Act XXV. of 1871 makes it unlawful for a passenger to enter a carriage without having first paid his fare and obtained a ticket, still that such prohibition must be read in connection with the rest of the section, and that as it expressly provides that in case the

traveller does not produce his ticket, he is to pay the fare or increased fare, the company might enforce that provision, but could not treat the plaintiff as a trespasser. This argument, assuming that the section is to be read as a whole, derives some support from the remarks of Coleridge, J., at the conclusion of the judgment in the *Great Northern Railway Company vs. Harrison*,⁽¹⁾ but it is not necessary for us to express an opinion on the point, as we think that the latter part of the section applies only to the case of a person who has received a ticket, and will not or cannot produce it, and not to a person, as in this case, travelling without having paid for and obtained a ticket, with no intention to defraud. Such was the construction placed on identically the same words embodied in a bye-law of the Lancashire and Yorkshire Railway Company in the case of *Dearden vs. Townsend*:⁽²⁾ "It seems to me," says Cockburn, C.J.,⁽³⁾ "that the bye-law relates to the case of a person having a ticket but failing to conform to the regulations of the company by producing it," and Lush, J., says⁽⁴⁾: "The bye-law seems only to be pointed at what is to be done with the ticket with which the passenger is required to provide himself and at the consequence of not producing and delivering it up as required." Lastly, it was urged that there was no fraudulent intention. Now, a fraudulent intention is doubtless, by section 3 of Act XVIII. of 1854, made an essential condition of travelling on a railway without payment of the fare being dealt with as an offence, but the absence of such intention does not make the entry into the carriage less unlawful, or of itself afford any ground for depriving the company of the right of putting an end to such unlawful occupation. Having started, therefore, from Surat under circumstances which, we think, entitled the company to treat the plaintiff as a trespasser, the question arises whether anything subsequently occurred which changed the character of his occupation of the carriage. It appears that at Navsári station, having, for the first time, ascertained that his master had not taken a ticket for him, the plaintiff applied to the station-master for a ticket but was refused. He was, however, allowed to continue his journey. At Bulsár the plaintiff repeated his attempt to obtain a ticket, but was again refused. However, he was allowed by the guard to pro-

1875.

PRATAP DÁJI
vs.
THE B. B. &
C. I. RAILWAY
COMPANY.

(1) 23 L. J. Ex. 308; see page 310.

(2) L. R. 1 Q. B. 10.

(3) L. R. 1 Q. B. 14.

(4) L. R. 1 Q. B. 15.

1875.

FRATAB DÁJI
vs.
THE B. B. &
C. I. RAILWAY
COMPANY.

ceed with the train, and did so until it arrived at Dáhánu. This conduct on the part of the railway officials at intermediate stations, if indeed it amounted to leave and license to the plaintiff to travel in the train without a ticket, could only operate as such until the train stopped at the next station. On arriving at Dáhánu, where it appears tickets are examined, both the plaintiff and his master on his behalf made strenuous efforts to obtain a ticket, offering at the same time to deposit with the station-master any sum he might require. Not only, however, was this refused, but the plaintiff was forbidden by the station-master to enter the carriage, and upon his doing so was removed by his orders and not allowed to continue his journey to Bombay. The Judge who tried the cause held that the station-master was bound to give the plaintiff a ticket, and if this were so, it might be that the station-master would not have been justified in treating the plaintiff as a trespasser and removing him. We are, however, of opinion that there was no such legal obligation. The common law right of a traveller to be conveyed by the carrier of passengers on his readiness to pay the usual fare is subject to the condition that he offers himself as a passenger at a reasonable time and place. It would be most inconvenient and unreasonable, we think, regarded from a public point of view, were we to hold that a passenger by a train has a right to require the station-master, on the arrival of the train at an intermediate station, to leave the platform where he has special duties connected with the train and passengers and return to his office for the purpose of procuring him a ticket. It is the general practice at intermediate stations for the station-master to close the office for the distribution of the tickets on the arrival of the train. This practice has been adopted to enable the officials, and more especially the station-master, to attend to the particular matters which arise during the stoppage of the train in the station, and we can see no ground upon which a passenger by a train can claim to have the distribution of tickets resumed on his behalf which had been already closed for the public outside the station. In the present case, moreover, it would have been necessary, in the first place, for the station-master to have heard the plaintiff's story, decided upon its correctness, and determined what he was bound to pay as far as Dáhánu before he could, with due regard to the interests of the company, have given him a ticket

from Dáhanu to Bombay, as otherwise it is plain that the fare from Surat to Dáhanu might have been lost to the company. We think, therefore, that there was no such legal obligation on the part of the company to furnish the plaintiff with a ticket as was contended for, and that the station-master was, under the circumstances, justified in removing the plaintiff from the train. The rule must, therefore, be made absolute. Parties to pay their own costs of the rule for a new trial and of the reference.

1875.

PRATAB DÁJI
ES.
B. B. & C. I.
RAILWAY
COMPANY.

RA'VJI JAIRAM, PLAINTIFF, versus BHAU BALU, DEFENDANT.

1876.

Limitation—Suit for board supplied.—Keeper of hotel, tavern, or lodging-house—Act IX. of 1871, schedule 2, articles 8, 115.

Dec. 15.

Article 8 of schedule 2 of the Limitation Act IX. of 1871 does not apply to a case of food or drink supplied by a person other than the keeper of a hotel, tavern, or lodging-house. The period of limitation in such a case is three years as prescribed by article 115.

CASE stated for the opinion of the High Court under section 55 of Act IX. of 1850.

1. In this suit the plaintiff seeks to recover from the defendant the sum of Rs. 25-8-0 for board supplied to the defendant by him from 19th March to 10th September 1874, being six months, at Rs. 4-4-0 per month. A copy of the summons marked A. is annexed.

2. The suit to recover the aforesaid sum was instituted on the 30th September 1875.

3. The defendant urged the two following pleas, namely :

(1) That the suit was barred by the Law of Limitation (Act IX. of 1871).

(2) That the plaintiff had never supplied board to the defendant.

4. On the evidence before me I came to the conclusion that the plaintiff had supplied board to the defendant as in the plaint alleged. I was not able to find on the evidence before me that he was either the keeper of a hotel, tavern, or lodging-house.

5. It was urged for the defendant that the plaintiff should be considered as the keeper of a hotel, that article 8 of the second schedule of Act IX. of 1871 applied to his claim, and that it should be dismissed under section 4 of the said Act ; and it was also urged

1876.

RÁYJI
JAIRAM
vs.
BHAU BALU.

that by clause 2, section 1, of Act XIV. of 1859, the former law on the subject, the period of one year from the time the cause of action arose, applied to claims for tavern bills, or bills for board and lodging or lodging only.

6. For the plaintiff it was contended that his case fell within article 115 of the same schedule, and that he was neither the keeper of a hotel, nor tavern nor lodging-house, and that article 8 was not applicable to his claim.

7. Concurring in the arguments of the plaintiff's advocate I held that the suit was not barred by the law of limitation, and decreed that the plaintiff was entitled to recover the sum claimed by him contingent upon the opinion of their Lordships the Judges of the High Court on the following question:—Whether article 8 of the second schedule of Act IX. of 1871 is applicable to the plaintiff's claim or article 115 of the same schedule?

8. If article 8 be held to govern the plaintiff's claim the suit will be dismissed under section 4 of Act IX. of 1871, and if that article be held not to be applicable the verdict entered for the plaintiff will stand good.

JUDGMENT OF THE HIGH COURT (Sir M. R. Westropp, C.J., and Sir C. Sargent, J.).—We are of opinion that the judgment of the Third Judge should stand.

1876.
Dec. 15.

HEARN AND OTHERS, PLAINTIFFS, versus BAPU SAJU NAIKIN,
DEFENDANT.*

*Attorney and client—Bill of costs—Act IX. of 1871, schedule 2,
article 85—Act VIII. of 1859, section 206.*

A Solicitor was retained in July 1871 to execute a decree. In November 1871 a prohibitory order was made in the cause, after which the Solicitor did nothing more in the matter. In June 1872 the decree-holder and judgment-debtor settled the matter in dispute between them without the knowledge of the Solicitor, but this compromise was not made through or certified to the Court which passed the decree. In a suit brought in December 1875 by the Solicitor against the decree-holder to recover the amount of his bill of costs:

Held, that the plaintiff's claim was not barred by article 85 of schedule 2 to Act IX. of 1871.

* Reported at I. L. R. 1 Bom. 505.

CASE stated for the opinion of the High Court under section 55 of Act IX. of 1850 by J. O'Leary, First Judge.

1. The plaintiffs, who are a firm of Solicitors in Bombay, were retained by the defendant in July 1871 for the purpose of executing a decree which had been obtained by the defendant. In November 1871 a prohibitory order was made in the cause, after which no further work was done in the matter by the plaintiffs for the defendant.

2. In June 1872 the defendant and her judgment-debtor settled the matters in dispute between them without the knowledge of the plaintiffs, but this compromise was not made through or certified to the Court which passed the decree.

3. On the 11th December 1875 the plaintiffs instituted the present suit against the defendant to recover from her the amount of their bill of costs. The defendant pleaded limitation, and relied on article 85 of schedule 2 of Act IX. of 1871. The Third Judge of the Court of Small Causes, who tried the case, found a verdict for the plaintiffs for the amount claimed. The defendant then moved for a new trial before the First, Third, and Fourth Judges, who, having differed in opinion, ordered the verdict for the plaintiffs to stand subject to the opinion of the High Court on the question, "Was the claim of the plaintiffs barred by the law of limitation"?

Macpherson, for the plaintiffs—Article 85 of schedule 2 of Act IX. of 1871 is no bar to the present suit, for there has been here no discontinuance by the attorneys of the business which they were conducting for the defendant, nor has that business terminated. The compromise between the defendant and her judgment-debtor cannot be recognized by the Court (Act VIII. of 1859, section 206), and therefore the Court cannot hold that compromise was the "termination of the suit or business" in respect of which these costs became due. *Whitehead vs. Lord*⁽¹⁾ governs the case.

There was no appearance on behalf of the defendant.

JUDGMENT OF THE HIGH COURT (Sir M. Westropp, C.J.,
and Sir C. Sargent, J.).

Let the decree for the plaintiffs by the Court of Small Causes stand. The costs of this reference must be paid by the defendant.

(1) 21 L. J. Exch. 239.

1876.

HEARN

vs.

BAPU SAJU
NAIKIN.

1876.
Dec. 15.

NATHA HIRA AND ANOTHER, PLAINTIFFS, versus JANARDHAN
RAMCHUNDRA AND ANOTHER, DEFENDANTS.*

Limitation Act IX. of 1871, schedule 2, article 72—Promissory note—Novation.

The holder of a promissory note payable on demand, dated 14th April 1870, demanded payment on 8th December 1872. The maker then paid interest in advance up to 1st April 1873, upon the condition that the holder should make no demand until that date.

Held, that this transaction amounted to the substitution of a new contract for that contained in the promissory note, that the period of limitation must be reckoned from 1st April 1873, and that, consequently, a suit to recover the balance due on the note instituted on 27th March 1876, was not barred.

CASE stated for the opinion of the High Court under section 55 of Act IX. of 1850 by J. O'Leary, First Judge.

1. The action in this case was brought for the recovery of a balance alleged to be due by the defendants to the plaintiffs on a promissory note bearing date 14th April 1870.

2. The said note purported to be payable on demand.

3. The first unqualified demand on the note was made on or about the 8th December 1872.

4. This suit was instituted on the 27th March 1876.

5. The defendants pleaded the Law of Limitation as a bar to the claim, the first absolute demand having been made more than three years before the institution of the action.

6. The plaintiffs contended that the period of limitation ought to be computed from 1st April 1873, and relied upon the following facts (which were proved to the satisfaction of this Court) in support of their contention :

(a) On the 8th of December 1872 the defendants made a proposal to the plaintiffs, which, translated into English, was in the following words :

"We pay you now interest up to the 1st April 1873. You are not to make any demand upon us until the 1st April 1873."

(b) The plaintiffs at once accepted this proposal.

(c) The defendants immediately on the plaintiffs' acceptance of their proposal as aforesaid, paid to the plaintiffs interest on the note up to the 1st day of April 1873.

(d) At the same time one of the defendants (Janardhan Ram-

chundra), with the knowledge and consent of his co-defendant, wrote a memorandum upon the note in the following form :

"8th December 1872. Paid interest up to 1st April 1873:"

7. During the interval of time that elapsed between the 8th December 1872 and the 1st April 1873, the plaintiffs made no demand for repayment of the amount secured by the note.

8. Upon this evidence the Fourth Judge, who tried the cause, disallowed the plea of limitation, and gave judgment for the plaintiffs for the amount claimed.

9. The defendants obtained a rule *nisi* for a judgment in their favour on the ground that the Fourth Judge was in error in holding that the plaintiffs were entitled to sue within three years from 1st April 1873.

10. The First and Fourth Judges, before whom the rule *nisi* came on for argument, discharged the rule subject to the opinion of the High Court, which we have now the honour to solicit upon the question :—"Whether the plaintiffs were entitled to bring their suit within three years from the 1st April 1873 under the circumstances stated in this case ?"

There was no appearance of the parties either in person or by Counsel.

JUDGMENT OF THE HIGH COURT (Sir M. R. Westropp, C.J.,
and Sir C. Sargent, J.).

We think that the transaction of the 8th December 1872 amounted to the substitution of a new contract for that contained in the promissory note of 14th April 1870, under which new contract the plaintiffs, in consideration of a payment of interest in advance up to the 1st April 1873, agreed to defer their demand for the principal, and to forbear to sue until that day. Hence the period of limitation must be reckoned from that day, and the suit having been brought on the 27th March 1876 is not barred. The verdict, therefore, should stand.

1876:

NATHA HIRA
vs.
JANARDHAN
RAMCHUNDA.

1877.
June 22.

NOWLA UMA, PLAINTIFF, versus BALA DHURMAJI, DEFENDANT.*

Jurisdiction—Bombay Court of Small Causes—Title to immoveable property—Form of suit—Practice—Leave to amend summons—Act IX. of 1850—Act XXVI. of 1864.

In a suit brought under section 91 of Act IX. of 1850, the Bombay Court of Small Causes has no jurisdiction to try a question of adverse title to the immoveable property, the subject of the suit. *Aliter* if the suit be brought under section 25 of Act IX. of 1850, as extended by section 2 of Act XXVI. of 1864, and the value of the property in dispute do not exceed Rs. 1,000.

In a case involving a question of adverse title the plaintiff should be allowed to amend the summons issued under section 91 of Act IX. of 1850, so as to render it conformable with a claim under section 25 of Act XXVI. of 1864, if the summons were issued in the mistaken form by the fault of the Clerk of the Court and not of the plaintiff.

CASE stated for the opinion of the High Court by J. O'Leary, First Judge, under section 55 of Act IX. of 1850.

1. This suit was brought by the plaintiff under section 91 of Act IX. of 1850, to recover possession of a room in a house.

2. The summons called on the defendant to quit and deliver up possession of a room in house &c. occupied by him as plaintiff's monthly tenant.

3. No evidence was taken by me, but certain facts hereinafter stated were admitted, and on the defendant's statement of his defence I struck out the case for want of jurisdiction; and on the request of the plaintiff I made that order subject to the opinion of the High Court.

4. Defendant, it was admitted, had been the owner of the house. It was, on 4th November 1873, purchased by plaintiff from a Marvadi firm called Huckma Lala & Co., who sold it under a power of sale contained in a mortgage deed dated 8th November 1869, executed by defendant in favour of Huckma Lala & Co.

5. Defendant admitted his signature to the mortgage deed of 8th November 1869 and also to a deed of further charge dated 10th January 1872.

6. He stated that he was drunk when he executed the mortgage of 8th November 1869, and that it was obtained from him by fraud and was not binding on him.

7. As to the deed of further charge, he also alleged fraud with regard to it, and that he had received no consideration for it.

* Reported at I. L. R. 2 Bom. 91.

8. Plaintiff alleged that the value of the house was about Rs. 2,000, and that the portion of it not occupied by defendant was occupied by tenants who paid plaintiff rent.

9. The question which I was requested to submit for the opinion of the High Court, and which I do accordingly respectfully submit, is whether, by the statement of such a defence as is set forth above by the defendant, in a suit brought under section 91 of Act IX. of 1850, the jurisdiction of the Court is ousted.

10. I was of opinion that it was, and struck out the case accordingly, subject to the opinion of the High Court, which I now respectfully solicit.

JUDGMENT OF THE HIGH COURT (Sir M. R. Westropp, C.J.,
and Sir C. Sargent, J.).

WESTROPP, C.J.—It is admitted that the defendant by deed of the 8th November 1869 mortgaged a house at Mazagaon to certain Marvadis. That mortgage contained a power of sale in the event of the mortgage money not being duly repaid at the time fixed. The defendant alleges that he was drunk when he executed that mortgage and that it was obtained from him by fraud, but he does not appear to have added that it was without consideration. He admits that on the 10th of January 1872 he executed in favour of the same Marvadis a deed of further charge on the same house. This deed the defendant alleges to have been obtained from him by fraud and without consideration.

The Márvadis sold the house, on the 4th November 1873, to the plaintiff under the power of sale contained in the first mortgage, that of the 8th November 1869. The learned Chief Judge of the Court of Small Causes does not state whether the vendors executed to the plaintiffs a deed of sale, but, in the absence of any statement to the contrary, we presume that such a deed was executed. It is also not mentioned whether the plaintiff, when he purchased the house, had notice of the assertions of the defendant that the first mortgage was obtained from him when he was drunk and by fraud and that the second mortgage was without consideration and procured by fraud.

The plaintiff alleged that the value of the house was about Rs. 2,000, but he brought his action to recover only one room in

1877.

NOWLA UMA
VS.
BALA
DHURMAJI.

1877.

NOWLA UMA
vs.
BALA
DHURMAJI.

it, occupied by the defendant, the value of which is not stated, but most probably was under Rs. 1,000, if not, as is not unlikely, under Rs. 500. The plaintiff asserted that the residue of the house was occupied by tenants who paid rent to him for their lodgings. This assertion is not stated to have been denied.

The Chief Judge observes that this suit was brought under section 91 of Act IX. of 1850, and we perceive that, although that section is not mentioned in the summons, his observation is manifestly correct, as is apparent from the form of that document, which treats the defendant as a monthly tenant of the plaintiff, and requires him in that capacity to quit and deliver up possession of the room in question to the plaintiff. The suit is clearly not brought upon section 25 of the same Act, the form of the summons under that section or section 2 of Act XXVI. of 1864 being, as is exemplified by the summons in *Walji Karimji vs. Jagonnath Premji and Gulbái his wife*,⁽¹⁾ to which case we shall presently advert, quite different from that under section 91. If this suit had been brought under section 25 of Act IX. of 1850, and if the room be under Rs. 500 in value, the Court of Small Causes would certainly have jurisdiction to try this case, notwithstanding that the title to the room is in dispute. The case of *Radhamoney Boystoney vs. Anundomaye Dabey*,⁽²⁾ decided in the Supreme Court at Calcutta by Peel, C.J., and Buller and Colville, J.J., in 1852, shows conclusively that to be so. Our recent decision in *Walji Karimji vs. Jagonnath Premji and Gulbái his wife*, in which we differed from the judgment of the Calcutta Court of Small Causes given in 1866 in *Sreemutty Shibosoonder Dossee vs. Taracknath Pandit*,⁽³⁾ shows that, in our opinion, the Bombay Court of Small Causes would have jurisdiction to try this suit if it had been brought under section 25 of Act IX. of 1850 taken in conjunction with section 2 of Act XXVI. of 1864, provided that the room did not exceed in value Rs. 1,000. But the learned Chief Judge of the Court of Small Causes has held that having regard to the fact that this suit is brought under section 91 of Act IX. of 1850 and to the nature of the defence set up, whereby the defendant disputes the plaintiff's title on the grounds already stated, the Court of Small Causes had no jurisdiction to try the suit, and, subject to the question submitted to us as to

(1) I. L. R. 2 Bom., page 84.

(2) 2 Ind. Jur. 144.

(3) 2 Ind. Jur., note to page 145 *et seq.*

whether it had such jurisdiction, has struck the cause out of his list.

His view is completely supported by a decision in 1851 of the Supreme Court of Calcutta in the case of *Hurreymoney Dossee vs. Gopaulchander Mookerji*,⁽¹⁾ when it ordered a writ of prohibition to issue to the Court of Small Causes in Calcutta, where the plaintiff had sued to recover land (exceeding Rs. 500 in value), whereof he had been in possession for many years under a conveyance from the father of the defendant and of which land he had been forcibly dispossessed by the defendant, who claimed as heir. The judgment of the Supreme Court was given by Peel, C.J., who, while admitting that the Court of Small Causes had jurisdiction to try the title to immoveable property, under section 25 of Act IX. of 1850, where the value did not exceed Rs. 500, said of section 91: "But the section on which this question turns is entirely different and framed with a different view: it is framed to empower the Court to give possession in certain cases, leaving the title untried, and subject to litigation in the same or another Court. It is important to bear in mind, in considering the meaning of this clause, that the Court for trial of Small Causes is directed to act on the same substantive law on which this Court proceeds, the procedure is different, but both Courts are subject to the same law. Therefore, whether in that Court or this, one suing to recover lands on title must recover on the strength of his own title. To turn the occupier out of possession, that he might try his title by suit, would in some cases expose him to immediate injury. The value of possession where there is no title is so well known that it would be quite unreasonable to suppose that it had escaped the notice of the Legislature, or that, when they reserved to another tribunal, or trial, this decision of title they meant to invert the position of the several claimants, to displace one from the possession, and to put in another whose claim, had he been in the position of a plaintiff, might not have been capable of proof, or might have been subjected also to some defect. The title of purchasers would, indeed, be exposed to new risks if the Legislature had sanctioned any such procedure, but nothing of the kind is inferrible from the Act. It is true that this Act differs in these sections from the language of the English Act from which it is mainly taken and goes

1877.

NOWLA UMA
vs.
BALA
DHURMAJI.

(1) 2 Taylor and Bell, 57.

1877.

NOWLA UMA
vs.
BALA
DHURMAJI.

beyond it. The corresponding section of that Act extends to landlords and tenants only, to persons who have stood to each other in that peculiar relation. This Act goes further: it uses the word 'occupier' as distinct from 'tenant,' and 'occupy' as distinct from 'hold.' But the context shows plainly that 'occupier' is used in a sense in which it is frequently employed to denote mere actual possessions of land which are permissive, or have been so; and yet where there is no holding or tenure by any hand, and no relation of a tenant to a landlord, or ever was, it includes adverse holdings on a once permitted occupation, as where a house has been lent, or a servant or clerk has in part occupied, but only as incidental to his service and not with any view to tenantry. The sense of the word is derivable from its association with the word 'tenant,' and it would be a strange rule of construction to force it into the sense of an adverse holding by one claiming to hold as absolute holder, whether on a good or bad title. There are some cases of adverse holding within the Act, as where the holder has once stood in a position to 'the owner' inconsistent with any claim of title in himself, as where he has come in under the owner, or those from whom the owner derives title, whether as tenant or as permitted user or occupier of the property without legal interest. But this case is merely that of possession by one claiming to hold absolutely as heir, whilst the claimant, 'the owner,' claims under the ancestor by some act in his lifetime. This is a pure adverse title between two claimants of the fee, and to such a case these sections—91 to 98—of the Act have no application. It was contended on the affidavits that jurisdiction existed in this case, because the actual occupier had ousted the claimant. The Act, however, does not extend to such a case, to restore possession on a forcible ouster, though a jurisdiction of the same kind exists in the mofussil. The whole language of the Act points to a continuation of occupation consequent on a once lawful possession. Prohibition appears to be a proper remedy: this remedy exists where the Court has jurisdiction, but is about to do something injurious to a legal right in a way unauthorized by law: it does not apply to mere errors of decision, which can only be remedied by appeal." What follows is peculiarly applicable here. Sir L. Peel continues thus: "In this case the value appears to be above that of the limit fixed for the jurisdic-

tion of the Court below: but, independently of that, if that Court was proceeding to eject, under these clauses, a person as to whom the claimant was not in the position of owner within the meaning of these sections (*i.e.* sections 91 to 98), the remedy would still attach even in a case where the title might be tried in that Court, because the inversion of the position of the rivals might work an irremediable wrong."

We understand Sir Lawrence Peel in that passage to mean that if the plaintiff has sued out his summons under the 91st and following sections of Act IX. of 1850, he ought not, in the event of its appearing that the property does not exceed Rs. 500 in value, to be permitted to treat the case as if the summons had been sued out under section 25 of that Act and to proceed with the case, although the defendant may claim against him the fee adversely. We are not prepared to differ from that view. If, however, it appears to the Court of Small Causes that the Clerk of the Court, and not the plaintiff, is, as very probably may be, the person responsible for the mistaken form in which the summons has been issued, it would, we think, be fair to permit the plaintiff to amend his summons so as to render it conformable with a claim under section 25 of Act XXVI. of 1864, provided the Court be satisfied that the room sued for does not exceed Rs. 1,000 in value, and that the plaintiff is, as he avers, in possession of the residue of the house, and that this suit, though ostensibly for a room, is not really brought to try the title to the house. In cases under Rs. 1,000 in value, the Court of Small Causes may, under the 25th section of Act XI. of 1850 combined with section 2 of Act XXVI. of 1864, hear such legal or equitable defence as the defendant may have.

If the Court of Small Causes be of opinion that there are not in this case such circumstances, as above indicated, which would justify an amendment, we think that the Judge would be right in dismissing the cause for want of jurisdiction, on the ground that a defence resting upon an adverse title to the fee takes the case out of section 91 of Act IX. of 1850.

The Court of Small Causes will dispose of the costs of this reference as may be just. There was not any appearance here by or for either party.

1877.

NOWLA UMA

VS.

BALA

DHURMAJI.

1878.
Jan. 18.

**BHAVAN MULJI, PLAINTIFF, versus KAVASJI JEHangIR JASAWALA
AND PEROSHA MERWANJI, LIQUIDATORS OF THE
AMRAOTI MILL COMPANY, DEFENDANTS.***

*Order and disposition—True owner—Indian Insolvent Act (11 and
12 Vic., cap. 21, sec. 23)—Constructive trustee.*

N., an original allottee of five shares in the A. company assigned them to B. No transfer was executed, and no notice of the assignment was given to the company, which subsequently went into liquidation. N. became insolvent. B. sued the liquidators of the company for the amount due in respect of the five shares on the first distribution of assets.

Held, that at the time of N.'s insolvency the plaintiff was the true owner of the shares within the meaning of section 23 of the Indian Insolvent Act (11 and 12 Vic. c. 21), and that as he had omitted to give notice to the company of the assignment to him, and as he had procured no transfer to be executed in his favour which the company, under their articles of association, were bound to recognize, he had consented that the shares should remain in the order and disposition of N. and consequently the shares and the right to receive any distribution of assets in respect of them vested, upon N.'s insolvency, in the Official Assignee.

Semble,—The principle that a person who is under an obligation to convey property to another is, in a Court of Equity, a trustee of such property for the latter, does not apply in cases where the reputed ownership clause of the Insolvent Act is in question.

Ex-parte Littledale(1) and *In re Sketchley*(2) followed.

CASE stated for the opinion of the High Court under section 7 of Act XXVI. of 1864 by J. O'Leary, First Judge.

1. In this action the plaintiff sought to recover from the defendants the sum of Rs. 1,000, being the amount of the first distribution of assets in the above company at the rate of Rs. 200 per share, in respect of five shares in the said company held by the plaintiff.

2. It appeared that one Nagardás Purmanandás was allottee of five shares in the Amraoti Mills Company and that he assigned these shares to the plaintiff. Nagardás having become insolvent and the Amraoti Mills Company having gone into liquidation, the defendants refused to pay plaintiff the amount due in respect of the five shares in question without the sanction of the Official Assignee of the estate of Nagardás.

3. At the hearing it appeared that Nagardás Purmanandás was an original allottee of shares in the Amraoti Mills Company. No share certificates were ever issued in this company, and the only

* Reported at I. L. R. 2 Bom. 542.

(1) 6 DeGex, M. & G. 714.

(2) 1 DeGex. & J. 163.

document which Nagardás ever obtained as evidencing his right to five shares in that company, was a receipt for Rs. 1,250, being the first call on five shares in the said company, and which was signed by the then secretaries and treasurer of the said company.

4. By a memorandum of assignment dated 30th November 1874, Nagardás Purmanadás assigned his right to the five shares in question to the plaintiff.

5. On the evidence I found—(1) That the shares in question had been allotted to Nagardás Purmanandás before 30th November 1874 ; (2) That on or about the 30th November 1874 Nagardás by the document of that date above mentioned and for valuable consideration, professed to assign his right in the said shares to the plaintiff ; (3) That there was no notice to the Amraoti Mills Company of such assignment.

6. On the ground chiefly that the right of Nagardás Purmanandás to the shares in question was only a chose in action, and as no notice of the assignment had been given, the shares remained in the order and disposition of the insolvent Nagardás at the date of his insolvency and therefore passed to his assignee, I found for the defendants.

7. The date on which the Amraoti Mills Company went into liquidation was admitted to be October 1875.

8. The date of the filing of the petition in insolvency of Nagardás Purmanandás was not in evidence.

9. On the 4th of October 1876 Mr. Payne, for the plaintiff, required me to state a case for the opinion of the High Court on the following questions :

(1) Whether plaintiff was the true owner of the five shares in question within the meaning of the 23rd section of the Indian Insolvent Act ?

(2) Whether, supposing plaintiff was the true owner as aforesaid, the said shares were in the order and disposition of the said Nagardás Purmanandás at the time of his insolvency ?

Subject to the opinion of the High Court on the above question I found a verdict for the defendants.

Inverarity for plaintiff.

Mayhew for defendants.

1878.
—
BHAVAN
MULJI
ES.
KAVASJI
JEHANGIR.

1878.

BHAVAN
MULJI
VS.
KAVASJI
JEHANGIR.

JUDGMENT OF THE HIGH COURT (Sir Mr. R. Westropp, C.J.,
and Green, J.)

The action in this case was for the recovery of the sum of Rs. 1,000, being the amount of the first distribution of assets in the above-mentioned company (in liquidation) at the rate of Rs. 200 per share, in respect of five shares in the company held by the plaintiff.

The facts appearing from the case stated by the Judge were as follows :

That five shares in the company were allotted to one Nagardás Purmanandás before the 30th November 1874; that no share certificates were ever issued; that the only document which Nagardás ever obtained as evidencing his right to the five shares was a receipt for Rs. 1,250, the first call on five shares in the company, which receipt was signed by the then secretaries and treasurer of the company. The receipt was in the following form :

“Received from Nagardás Purmanandás, Esquire, the sum of rupees one thousand two hundred and fifty, being the amount of first call on five shares of Amraoti Cotton Mills as per allotment No. 132.

“Bombay, 27th Oct. 1874.”

“(Sd.) VOLKART BROTHERS.

It was further found by the Judge that on or about the 30th November 1874 Nagardás by a certain document (a copy of which is annexed to the case) of that date and for valuable consideration, purported to assign his right in the said shares to the plaintiff.

This document signed by Nagardás and stamped was in the following form :

“To M. Bhowanji Mulji, written by Nagardás Purmanandás. To wit : I have this day sold to you five shares, namely five shares of the Amraoti Cotton Mills Company, Limited, on receiving Rs. 750, namely seven hundred and fifty, in cash, at the rate of Rs. 150, namely one hundred and fifty, per one share. I have given in writing (this) receipt of the first call in respect of these above-mentioned shares, and if any one makes any objection in respect of these shares, I am duly to make answer to you, and if any profit or loss ensued regarding these shares, all (that) is on your head, and you are duly to pay the calls in respect of these shares, which may have to be paid hereafter.”

It is found, further, that no notice of this assignment was given to the company, that the company went into liquidation in October 1875, that there were surplus assets distributed among the shareholders, and that Nagardás had become insolvent, and his property

had passed to the Official Assignee under the Indian Insolvent Act. The date at which he filed his petition for the benefit of the Act is not stated in the case.

The action, it appears, was for the amount of assets alleged to be payable to the plaintiff in respect of the said five shares of which he claimed to have become and to be the holder.

The Judge at the hearing passed a verdict for the defendants on the ground, chiefly, that the right of Nagardás Purmanandás to the shares in question was only a chose in action, and as no notice of the assignment had been given the shares remained in the order and disposition of the insolvent Nagardás at the date of his insolvency, and, therefore, passed to his assignee. Such verdict was, however, upon the request of the plaintiff's attorney for the statement of a case given contingent on the opinion of the High Court on the following questions :

(1) Whether plaintiff was the true owner of the five shares in question within the meaning of the 23rd section of the Indian Insolvent Act ?

(2) Whether, supposing plaintiff was the true owner as aforesaid, the said shares were in the order and disposition of the said Nagardás Purmanandás at the time of his insolvency ?

The words of section 23 of the Indian Insolvent Act (11 and 12 Vic. cap. 21), on which the present question arises, are as follows :

"If any insolvent shall, at the time of filing his petition &c., by the consent and permission of the true owner thereof, have in his possession, order, or disposition any goods or chattels whereof such insolvent is reputed owner, or whereof he has taken upon him the sale, alteration, or disposition as owner, the same shall be deemed to be the property of such insolvent so as to become vested in the Official Assignee &c."

It was argued on behalf of the plaintiff that the operation of the section of the Insolvent Act above cited was excluded by the fact that the bankrupt Nagardás was a trustee of the five shares for the plaintiff, and that the case was governed by *Re Bankhead's Trust*.⁽¹⁾ It was there held that the bankrupt had constituted himself a trustee of certain policies of insurance (retained, however, in his own possession) for the purpose of answering certain appropriations to his own use of trust funds in his hands. It was held that the

1878.

BHAVAN

MULJI

ES.

KAVASJI

JEHANGIR.

(1) 2 K. & J. 560.

1878.

BITAYAN
MULJI
vs.
KAVASJI
JEHANGIR.

bankrupt, being trustee of the policies for the purpose aforesaid, was the proper person to be in possession of them, and was, in fact, himself the real owner of them within the meaning of the provision of the English Bankrupt Law as to reputed ownership by a bankrupt, of goods and chattels, and that the provision in question applied only where the bankrupt and the real owner were distinct persons. That authority does not, however, we think, apply to the present case, for the reason that we do not consider that the insolvent Nagardás, for the purposes, at least, of this case, was in any proper sense of the word a trustee of the shares in question here. The instrument of assignment of the 30th November 1874 does not purport to be a declaration of any trust. It is, no doubt, as an instrument of assignment, ineffectual to transfer the shares, having regard to clauses 16 to 22 of the articles of association of the company (which were put in evidence at the hearing before us), though it would, we consider, have had effect given to it as an agreement to transfer had the plaintiff brought a suit against Nagardás to have a regular transfer executed, which would be in conformity to the articles of association of the company. Though, no doubt, in a certain sense one who is under an obligation to convey property to another is, in a Court of Equity, a trustee of it for the latter, yet this principle has not, it seems, been applied in cases where the reputed ownership clause of the Bankrupt Act is in question, as may be seen from the cases of *Ex-parte Littledale*⁽¹⁾ and *Re Sketchley*.⁽²⁾ A number of authorities were cited in the argument which had more or less bearing on the questions under consideration. But we consider that the two cases we have just mentioned are more distinctly in point. From a consideration of these authorities we are of opinion that at the time of the insolvency of Nagardás the plaintiff was the real owner of the shares in question within the meaning of section 23 of the Indian Insolvent Act, and that inasmuch as he had omitted to give to the company any notice of the assignment to him, and had, in fact, no transfer or assignment at all executed in his own favour which the company, under their articles, were bound to act upon or in any way to recognize, he, the plaintiff, had consented that the shares in question should be in the "order or disposition of the insolvent." There was nothing done, in our opinion,

(1) 6 DeGex. M. & G. 714.

(2) 1 DeGex. & J. 163.

which would have prevented Nagardás from executing a formal transfer of the shares, in conformity with the articles of association, to another person, which transfer the company would have been bound to recognize. This being so, we are of opinion that the shares, with the consequent right to receive any distribution of assets in respect of them, vested in the Official Assignee of Nagardás.

The questions, therefore, referred for the opinion of this Court must be answered in the affirmative, and judgment will be entered for the defendants. The plaintiff must pay the defendant's costs of reserving the said questions, and stating the same for the opinion of this Court, and the costs incidental thereto.

Attorneys for plaintiff—Messrs. *Jefferson and Payne*.

Attorneys for defendants—Messrs. *Ardeshir and Hormusji*.

1878.
BHAVAN
MULJI
vs.
KAVASJI
JEHANGIR.

CASSAM JUMA, BY HIS CONSTITUTED ATTORNEYS KHIMA
DOLLA AND COMPANY, TRADING UNDER THE NAME OF
KHIMA DOLLA, PLAINTIFF, versus THAKAR LILADHUR
KESSOWJI, DEFENDANT.*

1878.
Mar. 23.

*Splitting cause of action—Tradesman's account—Act IX. of 1850, section 34—
Small Cause Court jurisdiction.*

A tradesman cannot, by keeping separate accounts of his dealings with a customer, split his cause of action, so as to bring his suit within the jurisdiction of a Small Cause Court in the Presidency towns.

CASE stated for the opinion of the High Court under section 7 of Act XXVI. of 1864 by J. O'Leary, First Judge.

1. In this case the plaintiff by his attorney sued the defendant to recover the amount of an adjusted account for goods sold and delivered.

2. The adjustment was admitted and also the fact that the obligation to pay arising under it had never been discharged.

3. The facts were that the defendant being indebted to the said plaintiff Cassam Juma on foot of the account sued upon and five other adjusted accounts, amounting in all to the sum of

* Reported at I. L. R. 2 Bom. 570.

1878.

CASSAM
JUMA
RS.
THAKAR
LILADHUR
KESSOWJI.

Rs. 4,540-8-3, the said plaintiff by deed of assignment, dated 28th May 1877, assigned the whole of the said claims for value to the Marwādi firm of Khima Dolla, the plaintiff's attorneys abovenamed.

4. The deed of assignment contained the usual power of attorney to the assignees to sue in the name of the assignor.

5. The defendant on the 4th June 1877 had notice of the said assignment.

6. For the defendant it was contended that the plaintiff Cassam Juma having assigned all his interest in the debt could not, either in person or by attorney, sue for and recover the same, and it was further contended that "if Khima Dolla and Company were to be regarded as plaintiffs," that their claim was for a sum exceeding Rs. 1,000, and that they could not sue in this Court without abandoning the excess.

7. I was of opinion that as the suit was constituted the plaintiff might have a decree.

8. The case was not argued before me with reference to the judgment of Couch, C.J., in the case of *Blackwell & Co. vs. Sumar Ahmed* (613 B. H. C. R. [O. C. J.] 88), as to whether the letter of 4th June 1877 did not consolidate the claims.

9. It will be observed that the adjustment sued upon was made on July 7th, 1874, so that more than three years have now elapsed from the date of the adjustment. I would have been willing to make any amendment in the case as to names of parties or otherwise, necessary for the purposes of justice.

10. Cassam Juma was in Court assenting to the carrying on of the suit.

11. I gave judgment for the plaintiff for the sum of Rs. 967-12 and costs, and I certified plaintiff's costs Rs. 34. At the request of defendant's solicitor I gave the above judgment contingent upon the opinion of the High Court on the question whether under the above state of facts this Court was competent to make a decree in case against the defendant.

Inverarity for defendant.

B. Tyabji for plaintiff.

JUDGMENT OF THE HIGH COURT (Sir M. R. Westropp, C.J.,
and Sir C. Sargent).

WESTROPP, C.J.—We think that this is the case of a tradesman's running account, and, therefore, falls within the authority of *Grimbly vs. Aykroyd*.⁽¹⁾

Cassam Juma the creditor, appears, indeed, to have kept separate accounts, in the hope of being thereby enabled to split his demand, and to sue on each of them in the Court of Small Causes, and thus to frustrate the law which prohibits the splitting of a cause of action. We must decline to co-operate with him in attaining that object.

Reverse the judgment of the Small Cause Court, and let a non-suit be entered.

The plaintiffs must pay the costs of the suit and of this reference.

Order accordingly.

Attorneys for the plaintiff—*Balcrishna and Bhagvandas*.

Attorneys for the defendant—*Lynch and Tobin*.

1878.
CASSAM
JUMA
vs.
THAKAR
LILADHAR
KESSOWJI.

SURATRAM BHAYA, PLAINTIFF, versus THE GREAT INDIAN
PENINSULA RAILWAY COMPANY, DEFENDANTS.*

1878.
Nov. 80.

*Railway Company—Act XVIII. of 1854, sections 11 and 43—Carriers—
Evidence—Burden of proof.*

The defendants having made arrangements with the Madras Railway Company for the through carriage of goods, received from the plaintiff's agent at Poona thirty bags of jowári to be conveyed thence to Bellary and delivered to the plaintiff's agent there. The "goods consignment note," which was signed by the plaintiff's agent at Poona, contained the following condition, of which he had due notice: "The company receive goods for conveyance to stations on other railways with which they have made arrangements to book through, subject to the rules and regulations and rates and fares of the respective companies over whose lines the goods may pass." On reaching Raichore the bags of jowári were transferred from the defendants' waggon in which they had left Poona, into a waggon of the Madras Railway Company. One bag was subsequently lost, but the remaining twenty-nine arrived, and were unloaded in good condition at Bellary on the 19th September 1877. No steps were taken either by the defendants or by the Madras Railway Company to give information of the arrival of the bags to the consignee, and he never received them. The plaintiff sued to

(1) 1 Ex. 479.

* Reported at I. L. R. 3 Bom. 96.

1878.
 —
 SURATRAM
 BHAYA
 vs.
 THE G. I. P.
 RAILWAY
 COMPANY.

recover their value. The defendants pleaded, first, that, under a rule of the Madras Railway Company in force at the time of the making of the contract between the plaintiff and the defendants, delivery was complete the instant the bags were unloaded at Bellary; and, second, that the plaintiff's agent at Bellary did not apply for the goods, but allowed them to remain in the station-yard until they became rotten by rain, and were destroyed by order of the Collector some time in November. The Madras Railway Company had issued a public notice of the above rule in the following terms: "The Madras Railway Company hereby give public notice that they will not be responsible for loss of or damage to grain after it has been unloaded from the company's waggons." The defendants sought to incorporate this notice into their contract with the plaintiff by virtue of the condition printed in their "goods consignment note."

Held, that the said public notice afforded no protection to the defendants, on the ground that it was invalid as a regulation for non-compliance with the provisions of section 43 of Act XVIII. of 1854, inasmuch as it had not been sanctioned by the local Government and had not been posted up at all the stations of the Madras line of railway, and that it could not otherwise be binding against the plaintiff, as neither the plaintiff nor his agents were shown to have had any knowledge of it at the time of entering into the contract with the defendants.

Quære—Whether, if the plaintiff or his agents had such knowledge at the time of making the consignment, the notice would have constituted such a stipulation as to contravene section 2 of Act XVIII. of 1854, or whether it might be read together with that section, and treated as effectual except so far as its operation would be limited in its scope by that section.

Held, also, that the arrival of the grain at the station of destination (Bellary) having been proved, the burden of showing that the goods were ready for delivery to the plaintiff for a reasonable time after such arrival lay on the defendants, although no proof had been given of any application for delivery by the plaintiff within a reasonable time.

It is the duty of a railway company to keep goods, which have reached the station of their destination, ready there for delivery until the consignee in the exercise of due diligence can call for and remove them, and it is the duty of the consignee to call for and remove them within a reasonable time.

Semble,—The object of section 2 of Act XVIII. of 1854 is to preclude railway companies from being able by any stipulation to escape from liability for loss or injury to goods caused by the gross negligence or misconduct of their agents or servants.

CASE stated for the opinion of the High Court under section 7 of Act XXVI. of 1864 by W. E. Hart, First Judge.

1. This was an action to recover the sum of Rs. 540 as the value of thirty bags of jowári delivered by the plaintiff's agent at Poona to the defendant-company to be by them carried thence for hire to Bellary on the Madras Railway line.

2. The contract is contained in the "goods consignment note," which was signed by the plaintiff's agent at Poona, and on the back

of which are printed a number of conditions, of which I hold the plaintiff to have had notice at the time of the making of the contract.

3. From this contract it appears that the said goods of the plaintiff were to be carried by the defendants to Bellary and there delivered to Samurmul Acharya, who was the plaintiff's agent at that place, subject to the said conditions. The last of these conditions is in the following words: "The company receive goods for conveyance to stations on other railways with which they have made arrangements to book through, subject to the rules and regulations and rates and fares of the respective companies over whose lines the goods may pass."

4. The defendants have made arrangements with the Madras Railway Company for the through carriage of goods, and to get from Poona to Bellary goods have to be put upon the Madras Railway at Raichore, whence they proceed the rest of the way by the line of the latter company.

5. The goods in question were at Raichore transferred from the two waggons of the defendants in which they left Poona, into a waggon of the Madras company which arrived at Bellary, and was there unloaded on the 19th September 1877, when it was found to contain twenty-nine bags only bearing the plaintiff's marks. These twenty-nine bags arrived in good condition, but no steps were ever taken by the defendants or the Madras company to inform the consignee of their arrival.

6. At the hearing before me the defendants admitted liability in respect of the one bag found short at Bellary, but set off against it the sum of Rs. 45-12-1 as freight for the thirty bags which the plaintiff admitted he had not paid. As to the remaining twenty-nine bags the defendants pleaded, first, that, under a rule of the Madras Railway Company in force at the time of the making of the contract between the plaintiff and the defendants, delivery was complete the instant the bags were unloaded at Bellary, and second, that the plaintiff's agent at Bellary did not apply for the goods, but allowed them to remain in the station-yard until they became rotten by rain, and were destroyed by order of the Collector some time in November.

7. As to the first defence, the rule on which the defendants relied and which was referred to throughout the proceedings before me as the "Madras Rule," was not one of those placarded at every station

1878.

SURATRAM
BHAYA
VS.
THE G. I. P.
RAILWAY
COMPANY.

1878.

SURATRAM
BHAYA
vs.
THE G. I. P.
RAILWAY
COMPANY.

on the line, which had obtained the sanction of the local Government, and had been in force for a considerable time, but was one that had been introduced in November 1876 at Bellary, Adoni, Cuddapah and Bangalore only, and related merely to the grain traffic, and in determining the validity of the defence it is important to consider the history of this "Madras Rule."

8. On the 20th November 1876 the Madras Railway Company, without having previously obtained the sanction of the local Government, issued a public notice in the following terms: "The Madras Railway hereby give public notice that they will not be responsible for loss of or damage to grain after it has been unloaded from the company's waggons." On the 15th April 1877 the Madras Railway Company commenced to use, for the grain traffic only, and in respect only of consignments originally sent from stations on their own line, a new form of forwarding note for which they had not previously obtained the sanction of the local Government, and which contained the following condition: "The above goods shall be taken delivery of immediately the same are unloaded at the station of destination, and the company shall not be liable in respect of loss or damage done thereto arising from theft, rain, fire, or from any other cause whatsoever, notwithstanding that the same be permitted to remain on the railway company's premises, it being agreed that delivery shall be completed on the unloading of the goods, and that from that time they remain at the sole risk of the party entitled thereto." This condition, in conjunction with the public notice, constituted the "Madras Rule," and which they sought to incorporate into their contract with the plaintiff by virtue of the last condition printed on the back of the goods consignment note.

9. On the introduction of the new form of grain-forwarding note, the Madras Chamber of Commerce addressed a letter of remonstrance on the subject to the local Government, and the Madras Government, after receiving various reports, made an order on the 20th June 1877 in the following words: "His Grace the Governor in Council is of opinion that the explanation furnished by the Traffic Manager is satisfactory, and that fair cause is shown for the additional clause in the forwarding note to which the Chamber of Commerce have drawn attention."

10. No further publication of the "Madras Rule" took place after the passing of the above order by the local Government, which order, it will, moreover, be observed was passed, not at the request of the railway company that its new rule might be sanctioned, but in answer to objections to its legality raised by the Chamber of Commerce.

11. There was no evidence whatever that at the time of the making of the contract between the plaintiff and the defendants, the plaintiff or the defendants or either of the plaintiff's agents at Poona or Bellary had seen either the public notice, or the new form of forwarding note, or had even so much as heard of the existence of the "Madras Rule."

12. The object of the last of the special conditions⁽¹⁾ printed at the back of the plaintiff's contract with the defendants appeared to me to be to protect the defendants from liability to make good to the plaintiff a loss arising on the line of another company in respect of which they were precluded by the rules of that company from demanding compensation in their turn. The "rules and regulations" contemplated by that special condition must, therefore, be only such rules and regulations as the Madras company could plead against the defendants, supposing the latter had compensated the plaintiff for his loss and sought to recover the amount from the Madras company.

13. It is evident that if the "Madras Rule" is such a regulation as is contemplated by section 43 of Act XVIII. of 1854, it is wholly invalid for want of compliance with the provisions of that section. On the other hand, if it be contended that the "Madras Rule" is not such a regulation as is contemplated by section 43, then it appears to me that neither is it such a "rule or regulation as was in the contemplation of the parties to the contract in the present case." At any rate, if the Madras rule be not a regulation within the scope of section 43 of Act XVIII. of 1854, it can only be regarded as a notice, but as such it cannot bind the plaintiff, for it was never brought to the knowledge of himself or his agents. In the hypothetical case suggested in the last paragraph the Madras Company could not be heard to say to the Great Indian Peninsula Company: 'We are

1878.

SURATRAM
BHAYA
vs.
THE G. I. P.
RAILWAY
COMPANY.

(1) See *supra* para. 3.

1878.
SURATRAM
BHAYA
vs.
THE G. I. P.
RAILWAY
COMPANY.

protected by this rule, which is not one of our general regulations, but merely a notice of limited effect and restricted application which we have never brought to your knowledge.' Neither, therefore, can the Great Indian Peninsula Company say this to the plaintiff.

14. Again, the "Madras Rule" appeared to me to be in contravention of the provisions of section 11 of Act XVIII. of 1854, because its terms are so wide as necessarily to include loss or damage arising from the neglect or default of the company or its servants. It is impossible to put any more restricted interpretation on those words, and according to them, the company would still not be liable even if its own servants stole the bags as fast as they were placed on the unloading platform. The case of *Patscheider vs. The Great Western Railway Company*⁽¹⁾ shows that the liability of a railway company as carriers continues for a reasonable time after the arrival of the goods at the station of destination, and it is of this liability that the Madras Company seek to rid themselves by means of the "Madras Rule" expressed in terms so wide and general as necessarily to include even loss occasioned by the company's own servants.

15. I accordingly held that the defendants could not avail themselves of the "Madras Rule," but must show that, for a reasonable time after the arrival of the plaintiff's goods at Bellary, they were ready for delivery to him at the usual place of delivery. Of this there was not the slightest evidence. All trace of the twenty-nine bags was lost immediately they were unloaded, and for all that appeared to the contrary, they might have been stolen, or destroyed, or removed by mistake for other goods within five minutes of their arrival, and the defendants entirely failed to identify the plaintiff's bags as being among those said to have been destroyed in November by order of the Collector. With regard to the Collector's order, moreover, it is worthy of remark that it is apparently not an order to destroy, but a suggestion that the work of destruction already voluntarily begun should be proceeded with more rapidity.

16. The plaintiff offered some evidence, which I did not believe, of repeated applications having been made by his agent for delivery in the months of September and October, and of his having been informed by the company's servants that his goods had not arrived.

(1) L. R. Ex. Div. 153.

But I held that the plaintiff's failure to prove this part of his case did not affect the question, as he could not be called upon to prove that he applied for delivery within a reasonable time until the company had first shown that for a reasonable time after arrival they had the goods ready for delivery to the plaintiff. I accordingly passed a verdict for the plaintiff for Rs. 237-5-11 (being the value of his thirty bags of jowári at the Bellary market rate of the day, less the sum of Rs. 45-12-1 for freight chargeable in respect of their carriage thither) together with costs; but at the request of the defendant's counsel this verdict was made subject to the opinion of the High Court on the following questions, which I accordingly submit, and request that the Honourable the Judges of the High Court will make such order in the case as they may think proper :

(1) Is the "Madras Rule" invalid for non-compliance with the provisions of section 43 of Act XVIII. of 1854?

(2) Is the "Madras Rule" void as being in contravention of the provisions of section 11 of Act XVIII. of 1854?

(3) Arrival of the goods at Bellary having been proved, and no application by the plaintiff within a reasonable time for delivery having been proved, was the onus rightly laid on the defendants of proving that the goods were ready for delivery to the plaintiff for a reasonable time after their arrival?

The plaintiff's pleader states that he has no question which he wishes to refer in the case, but it strikes me that one may arise in the event of its being held that the "Madras Rule" is not within the scope of section 43 of Act XVIII. of 1854, in which case it would, of course, not be invalid for non-compliance with the terms of that section, but in that case would it not still be inoperative as against the plaintiff, seeing that it was not brought to the knowledge of himself, his agents, or the defendants at the time of the making of the contract?

Plaintiff appeared in person.

The Advocate General (Honourable J. Marriott), Latham, and Farran for defendants.

1878.

SURATEAM
BHAYA
vs.
THE G. I. P.
RAILWAY
COMPANY.

1878.

SURATRAM
BHAYA
vs.

THE G. I. P.
RAILWAY
COMPANY.

JUDGMENT OF THE HIGH COURT (Sir M. R. Westropp, C.J.,
and Green, J.).

The first question is, whether a certain notice published (posted) by the Madras Railway Company on the 20th November 1876, to the effect that they will not be responsible for loss of or damage to grain after it has been unloaded from the company's waggons and styled in that question the "Madras rule" is invalid for non-compliance with the provisions of section 43 of Act XVIII. of 1854. That section provides that a copy of this Act and of the general regulations, time tables, and tariff of charges which shall from time to time be published by any railway company, with the sanction of the Local Government, shall be exhibited in some conspicuous place at each station of every railway, so that they may be easily seen and read, and all such documents shall be so exhibited in English and in the vernacular language of the district in which the station is situate, and in such other language, if any, as shall be required by order of the Local Government. It does not appear upon the case submitted to us that the notice in question ever did receive the sanction of the Government of Madras, or ever was submitted to that Government. The Madras Chamber of Commerce did, in May 1877, invite the attention of that Government to a clause in a forwarding note, then newly framed by the Madras Railway Company, and took exception to that clause, which, though resembling, is not identical in its terms with the notice of the 20th November 1876. And even if such identity existed, it does not thence follow that the Madras Government, although it seems to have, in June 1877 sanctioned the clause or at least to have pronounced it to be a fair one, would have sanctioned or can be regarded as having sanctioned the notice of November 1876. To sanction a clause in a form of contract which the consignor of goods is required to sign before the company accepts the goods for transmission is one act, and to sanction the publication of a notice which the consignor may or may not have an opportunity of seeing is another and quite different act. Without intending to give any opinion whether section 6 of Act III. of 1865⁽¹⁾ is applicable to this case, we may observe that such a distinction as we have been now suggesting is clearly drawn and enforced in that enactment. There not being any such sanction of the Govern-

(1) *Vide* section 10 of that Act.

ment of Madras as section 43 of Act XVIII. of 1854 contemplates, we think that the notice of November 1876 is unsupported by that section. There is this further defect in the same notice, considered in connection with that section, that there was not any such posting of that notice at each station on the Madras line as is enjoined by the same section. The posting took place only at Bellary and three other stations on that line. We hold that section 43 affords no protection to the defendants in this case, so far as the notice of November 1876 is concerned.

The second question submitted to us is whether the Madras rule, namely, the same notice, is void as being in contravention of the provisions of section 11 of Act XVIII. of 1854. That section runs thus : "The liability of such railway company for loss or injury to any articles or goods to be carried by them, other than those specially provided for by this Act, shall not be deemed or construed to be limited, or in anywise affected, by any public notice given or any private contract made by them, but such railway company shall be answerable for such loss or injury when it shall have been caused by gross negligence or misconduct on the part of their agents or servants." The first portion of that section seems to be qualified by the concluding sentence. Taken as a whole, the section appears to us to mean that a railway company shall be responsible for loss or injury caused by gross negligence or misconduct of their agents or servants (except in cases otherwise specially provided for by the Act, *e. g.* such cases at least as are mentioned in sections 9 and 10), notwithstanding any public notice given or private contract made by such companies to the contrary. At common law an ordinary carrier for hire might, by special contract, protect himself even against loss or injury occasioned by the gross negligence of himself or his agents : *Austin vs. The Manchester Sheffield and Lincolnshire Railway Company*⁽¹⁾, *Chappendale vs. The Lancashire and Yorkshire Railway Company*⁽²⁾, *Carr vs. The Lancashire and Yorkshire Railway Company*⁽³⁾, and per Blackburn, J., in *Peek vs. North Staffordshire Railway Company*⁽⁴⁾, and per Cockburn, C.J.⁽⁵⁾. The object of the 11th section appears

1878.

SURATRAM
BHAYA
ES.
THE G. I. P.
RAILWAY
COMPANY.

(1) 16 Q. B. 600, and see 10 C. B. 454. (2) 21 L. J. Q. B. 22.

(3) 7 Exch. 707.

(4) 10 H. L. C. 473 ; see 500 to 506.

(5) 10 H. L. C. 556 to 558. And see cases collected in note to page 1265 of Angell on Carriers (4th ed.)

1878.

SURATRAM
BHAYA
vs.
THE G. I. P.
RAILWAY
COMPANY.

to have been to fetter railway companies thus far in their power of contracting as to preclude them from being able by any stipulation to escape from liability for loss or injury to articles or goods caused by the gross negligence or misconduct of their agents or servants. True, the words "public notice" occur in the 11th section as well as the words "private contract". But there is not for the purposes of this section and irrespectively of section 43 (of which we have already disposed) any substantial difference between those phrases. Blackburn, J., in the case last quoted said: "But in *Kerr vs. Willan*⁽¹⁾ decided in 1817, and I think in all of the subsequent cases, it was held that the notice to be effectual must be brought home to the particular customer, which, in my opinion, shows that the condition (*i.e.* in the public notice) operated entirely by way of contract and not by way of restriction in the public profession." So completely was the necessity of bringing the notice home to the particular party established, that Mr. Smith in the first edition of his *Leading Cases* (which was published in 1837) says: "If this notice was not communicated to the employer it was, of course, ineffectual." And this expression of the self-evident nature of the proposition has been allowed to stand in all of the editions of his work, without remark or qualification by any of his very learned editors. Mr. Smith proceeds to add: "But if it could be brought home to his knowledge it was looked upon as incorporated into his agreement with the carrier and he became bound by the contents." That very learned gentleman evidently considered that at the time when he wrote (1837), it had become settled that the notice operated as a special contract with those to whom it was brought home, and not as a public condition, limiting the profession of the carrier.⁽²⁾ In the present case it has been expressly found by the learned Chief Judge of the Court of Small Causes that there was not any evidence that either the plaintiff or his agents at Poona or Bellary had ever seen or heard of the public notice of November 1876, or the subsequently framed new consignment note approved by the Government of Madras. In the consignment note given to the plaintiff's agent at Poona when he delivered the grain to the defendants for conveyance to Bellary, there is not any such stipulation as that in the public

(1) 6 M. & Sel. 150.

(2) Per Blackburn, J., *Peck vs. North Staff. R. Co.*, 10 H. L. C. at page 496.

notice of November 1876 or in the Madras new consignment note, and it has not been contended or alleged that there was any other special contract between the parties than that sought to be built upon the notice of November 1876 taken in connection with the Poona note. As neither the plaintiff nor his agents are shown to have had any knowledge of that notice, it is unnecessary for us to say whether if the plaintiff or his agents had knowledge of that notice at the time of making the consignment, it (the notice) would have constituted such a stipulation as might contravene section 11 of Act XVIII. of 1854, or whether it might be read together with that section, and treated as effectual, except so far as its operation would be limited in its scope by that section. Nor do we deem it necessary to consider now whether the consent of the Local Government would be indispensable to public notices or private contracts under section 11 as suggested by Sir Barnes Peacock, C.J., in *The East Indian Railway vs. Jordan*.⁽¹⁾

The third question is this: "Arrival of the goods at Bellary having been proved, and no application by the plaintiff within a reasonable time for delivery having been proved, was the onus rightly laid on the defendants of proving that the goods were ready for delivery to the plaintiff for a reasonable time after their arrival?" We answer this question in the affirmative. The case of *Patscheider vs. Great Western Railway Company*,⁽²⁾ cited by the Chief Judge, related to the personal baggage of a passenger; but we think that the same principle there quoted by Cleasby, J., from Redfield on Carriers, "That it is the duty of a railway company, to the luggage of a passenger which has reached its destination, to have the baggage ready for delivery upon the platform at the usual place of delivery until the owner, in the exercise of due diligence, can call and receive it, and it is the owner's duty to call for and remove it within a reasonable time" applies to a consignment of goods, and that the railway company ought to have the goods after they have reached the station of their destination ready there for delivery until the consignee, in the exercise of due diligence, can call for and receive them, and it is his duty to call for and remove them within a reasonable time. The burden lies on the railway company to show that they had the goods ready for delivery for a reasonable time after

1878.

SURATRAM
BHAYA
VS.
THE G. I. P.
RAILWAY
COMPANY.

(1) 4 Beng. L. Rep. 97, 102.

(2) L. R. 3 Ex. Div. 153.

1878.

SURATRAM
BHAYA
vs.THE G. I. P.
RAILWAY
COMPANY.

arrival. This burden the Chief Judge considered that the defendants had not discharged. It seems, however, that the plaintiff assumed that the onus lay upon himself, in the first instance, to prove that he demanded delivery of the goods and that he failed to obtain it. This he essayed to establish, but the Chief Judge disbelieved the evidence given on behalf of the plaintiff that application had been made on his behalf at the station at Bellary for the goods, and we do not gather that during the trial it was contended that the defendants were bound to show that they had the goods ready for delivery for a reasonable time after their arrival at Bellary station. The struggle at the trial seems to have been on the plaintiff's side to prove that the delivery had been ineffectually demanded. This was calculated to throw the defendants off their guard. It would appear, and so we are informed by the learned Counsel of the defendants, that the point as to the necessity for proof, by them, that the goods were for a reasonable time after arrival ready for delivery was first raised in the judgment of the Court of Small Causes. The struggle being what it was, we think that the defendants must to a considerable extent have been taken by surprise by the raising of that point, for the first time, at the twelfth hour, namely, in the judgment of the Court, and ought to have further opportunity of proving readiness to deliver within a reasonable time; and we are of opinion that, under section 8 of Act XXVI. of 1864, we have power to direct—and we do now accordingly direct—a new trial for that purpose, and that it shall not be necessary for the Court of Small Causes to re-take the evidence already taken, but that it may use the same on the re-trial and take such further evidence as may be admissible and relevant on the questions of the readiness of the railway company to deliver within a reasonable time, and as to what is a reasonable time. Had these questions been distinctly raised at the original trial, we think it probable that the defendants would have offered in evidence rule No. 1 of the Madras Railway Company's regulations which points to thirty-six hours after arrival as a reasonable time. We are of opinion that the defendants should be at liberty to prove that the publication of that rule was sanctioned by the Madras Government, and then to put the rule itself in evidence. The concluding passage in the consignment note signed at Poona by the plaintiff's agent would render that rule binding on the plaintiff if it and its sanction

by the Madras Government be proved. The circumstance, already found by the Court of Small Causes, that the goods (minus one bag) reached Bellary station in safety ; the improbability that they would have suddenly disappeared ; the deliberate avoidance by the consignee of any attempt to obtain delivery ; the bringing of this suit being, apparently, the first act in the nature of a demand on behalf of the plaintiff for delivery, and that too in Bombay, where the defendants are not and never were bound to deliver ; the circumstance that the absence of any demand at Bellary prevented the attention of the defendants' servants being very specially called to the plaintiff's goods are facts which, if they do not remove from the defendants, at least to some extent lighten the burden cast upon them of proving readiness to deliver within a reasonable time after arrival of the goods. The costs of this reference and of the suit should be disposed of by the Court of Small Causes on the re-trial in such manner as it may deem just.

Order accordingly.

Plaintiff appeared in person.

Attorneys for the defendants—Messrs. *Hearn, Cleveland, and Little.*

1878.

SURATRAM
BHAYA
vs.
THE G. I. P.
RAILWAY
COMPANY.

LUCKMIDA'S KHIMJI, PLAINTIFF, versus MULJI KANJI, DEFENDANT.*

Small Cause Court—Jurisdiction—Equitable defence—Plea by defendant of his own fraud—Act IX. of 1850, sections 91, 98, 25.

1880.

Feb. 21.

The plaintiff in 1879 took out a summons under section 91 of the Presidency Small Cause Court Act IX. of 1850, calling on his nephew the defendant to deliver up possession of certain premises in his occupation belonging to the plaintiff. The plaintiff alleged that he had purchased the premises in question in 1870 from one N. to whom the defendant had mortgaged them in 1866 with power of sale. The plaintiff produced the deed of mortgage to N. and the conveyance to himself. It was admitted on his behalf that he had never received any rent from the defendant, and never had manual possession of the premises occupied by him. But the plaintiff produced a writing of attornment dated April 1873, passed to him by the defendant, whereby the latter acknowledged that he was occupying the premises in question as the plaintiff's tenant, and agreed to pay rent for the same at Rs. 25 a month. His defence was that the mortgage, the sale, and the writing of attornment were all merely colourable, executed for the purpose of defeating his creditors and screening the property from execution ; that no money had passed between the parties ; that the defendant had

* Reported at J. L. R. 5 Bom. 295.

1880.

LUCKMIDÁS
KHIMJI
vs.
MULJI
KANJI.

never been out of possession, and that the plaintiff required the Court to assist him in turning his own wrong to his own advantage. At the hearing in the Court of Small Causes the defendant proposed to prove the above facts, and submitted that, under the circumstances, a *bona fide* question of title was raised which ousted the jurisdiction conferred on the Court by section 91. The Court, however, refused to receive the evidence, and held that it had jurisdiction. On reference to the High Court,

Held, that the defendant was entitled to set up the defence which he did, and that it ousted the jurisdiction of the Court of Small Causes to proceed further with the action, inasmuch as such defence raised a question of adverse title which, in suits under section 91 of Act IX, of 1850, that Court had not jurisdiction to decide.

CASE stated for the opinion of the High Court under section 55 of Act IX. of 1850 by N. Spencer, Second Judge.

1. This is a summons issued under section 91 of Act IX. of 1850, calling on the defendant to show cause why he refuses to deliver up possession to the plaintiff of the second story and the gable of a house assessed under Nos. 70, 71, and 73, situated in Hanumán Gully, belonging to the plaintiff, which is now occupied by the defendant as, it is alleged, the tenant of the plaintiff.

2. The house in question was at one time the property of the defendant, and was, with other houses and lands belonging to him, mortgaged by him by a deed dated the 8th of October 1866, to one Nensey Hunsraj, to secure the repayment of the sum of rupees one hundred thousand and interest.

3. Default having been made by the defendant in payment of the mortgage-debt, the mortgagee, under the power given to him by the deed, put up the properties for sale by auction and the plaintiff as the highest bidder became the purchaser of the same.

4. It is admitted that on the 28th of April 1873 the defendant passed to the plaintiff a writing acknowledging that he was occupying the premises from which it is now sought to eject him, as the plaintiff's tenant, and agreeing to pay him rent for the same at Rs. 25 per month.

5. It is also admitted that, although he passed the agreement, the defendant has not paid the plaintiff any rent. No evidence was taken to account for no rent being exacted from him; but it was stated by the plaintiff's advocate that the reason was the relationship between the plaintiff and defendant, and because the defendant was in needy circumstances. The occupants of the parts of the house other than those occupied by the defendant, pay rent to the plaintiff,

but this is done according to the statement of the defendant's advocate by defendant's permission and in furtherance of the scheme hereinafter mentioned.

6. For the defendant it was alleged that he was a promoter of one of the financials which were started in Bombay in 1864, and that being liable to pay a large sum of money on account of calls due on the shares held by him, he, at the suggestion of the plaintiff, executed the mortgage of the 8th of October 1866; that the mortgagee, Nensey Hunsraj, was but a nominee of the plaintiff, and the mortgage a colourable transaction for the purpose of defeating his creditors, no consideration having been paid by the mortgagee. That the subsequent sale by auction to the plaintiff was also fictitious, no portion of the purchase-money having been paid by the plaintiff, and that the agreement to pay rent was a part of the same scheme, made with the view of giving the transaction a *bona-fide* appearance and that the plaintiff was only a trustee of the property of the defendant.

7. The defendant's advocate contended that under these circumstances there was a *bona-fide* question of title in dispute between the parties which ousted the jurisdiction conferred on this Court by section 91, and he proposed to call evidence to prove the facts stated in the preceding paragraph.

8. On the part of the plaintiff it was contended :

(1) That the defendant was estopped from denying the plaintiff's title.

(2) That the defendant was bound by the deed of mortgage and the writing, and could not be heard to say that they were executed as part of a scheme to defeat his creditors.

(3) That this Court's jurisdiction was only ousted when there was a question of title which could legally be raised in this case.

9. I was of opinion that there was no question of title involved in this case, so far as this Court was concerned, and I declined to receive the evidence tendered. I held that until the mortgage to Nensey Hunsraj and the conveyance to the plaintiff had been set aside by a Court of competent jurisdiction, this Court was bound to regard these deeds as *bona-fide* and executed for valuable consideration; that by these deeds the legal estate in the house had become vested in the plaintiff, and that by agreement the defendant had

1880.
LUCKMIDAS
KHIMJI
VS.
MULJI
KANJI.

1880.
 LUCKMIDÁS
 KHIMJI
 vs.
 MULJI
 KANJI.

acknowledged himself to be a tenant of the plaintiff, and that it was not within the province of this Court to receive the evidence proposed to be given.

10. I therefore gave judgment for the plaintiff, and directed that the defendant should quit and deliver up possession of the premises to the plaintiff; but at the request of the defendant's advocate this judgment was given contingent on the opinion of the High Court on the following point :

“Was there such a question of title involved or raised in this case as to deprive this Court of the jurisdiction conferred on it by section 91 of Act IX. of 1850, and was the Court in error in refusing to receive the evidence tendered ” ?

Pending the decision of the High Court on this question the execution of the warrant of possession has been stayed.

Kirkpatrick for the defendant.

The Honourable *F. L. Latham* (Acting Advocate General) for plaintiff.

JUDGMENT OF THE HIGH COURT (Sir M. R. Westropp
 and Maxwell Melvill, J.)

WESTROPP, C.J.—This is a reference from Mr. Spencer, one of the Judges of the Court of Small Causes at Bombay, in a suit brought in that Court under section 91 of Act IX. of 1850, whereby the plaintiff sought to eject the defendant from the second story and another portion of a house in Hanumán Gully in this island.

The defendant was originally the owner of the whole house and of considerable other immovable property, and, being so, mortgaged the same by deed of the 8th October 1866, to a fellow-casteman (as has been admitted at the Bar), one Nensey Hunsraj, for one lách of rupees, repayable with interest. Under a power of sale contained in the mortgage-deed, Nensey Hunsraj, on the ground that default had been made in payment of the money purported to be secured by the mortgage, put up the whole of the mortgaged premises for sale by public auction at which the plaintiff, being the highest bidder, became the purchaser, and the mortgaged premises were conveyed to him by Nensey Hunsraj under date the 16th August 1870. The price was Rs. 65,000 as stated in that conveyance. It is admitted that the mortgage and conveyance were registered. It is also

admitted that on the 28th of April 1873 the defendant executed and gave to the plaintiff a Gujaráti writing on a stamp of Rs. 1½, whereby he acknowledged himself tenant to the plaintiff, at Rs. 25 per mensem, of the second story and loft, the subject of the present suit. That instrument, it is admitted, was not registered. The learned Judge states that, notwithstanding the Gujaráti agreement just mentioned, it is admitted that the defendant has not paid any rent to the plaintiff. No evidence in explanation of this fact was given on behalf of the plaintiff, but his advocate said that the reason for such non-payment was the relationship between the plaintiff and the defendant and the needy circumstances of the latter. The relationship was, at the Bar here, stated to be that the defendant is nephew of the plaintiff. The occupants of the parts of the house, other than those occupied by him the defendant, pay rent to the plaintiff; but this, it was stated on behalf of the defendant, was merely in furtherance of the general scheme, the existence of which the defendant alleged as his defence, and was refused permission to prove.

The defendant alleged, and sought permission in the Court of Small Causes to prove, that the mortgage of 1866, the sale and conveyance of 1870, and the Gujaráti writing of 1873, were merely colourable transactions entered into for the purpose of securing the property, the subject thereof, from expected claims against the defendant, who had been a promoter of one of the financial associations in Bombay in 1864, and in that capacity had become liable to pay a large sum of money in respect of calls on shares held by him; that this scheme was devised by the plaintiff; that Nensey Hunsraj, the ostensible mortgagee, was the creature and nominee of the plaintiff; and that the plaintiff was no more than a trustee of the property for the defendant. Under these circumstances it was contended for the defendant that there was a *bona-fide* question as to the title which excluded the jurisdiction of the Court of Small Causes under section 91 of Act IX of 1850.

For the plaintiff it was contended that—

(1) The defendant could not be permitted to deny the plaintiff's title.

(2) That the defendant was by the mortgage of 1866 and the Gujaráti writing of 1870, estopped from making his proposed defence.

1880.

LUCKMIDÁS
KHIMJI
vs.
MULJI
KANJI.

(3) That the jurisdiction of the Court of Small Causes was only ousted when there was a question of title which could legally be raised, and that there was no question of title which could legally be raised in this case.

The learned Judge was of opinion that there was no question of title involved in this case so far as his Court was concerned, and he declined to receive the evidence tendered. He held that until the mortgage and conveyance had been set aside by a Court of competent jurisdiction the Court of Small Causes was bound to regard those deeds as *bona-fide* and executed for valuable consideration; that by those deeds the legal estate in the house had become vested in the plaintiff, and that by the Gujaráti writing the defendant had acknowledged himself to be a tenant of the plaintiff, and that it was not within the province of that Court to receive the evidence proposed to be given. Judgment was then given for the plaintiff contingent on the opinion of the High Court on this point—"Was there such a question of title involved or raised in this case as to deprive the Court of Small Causes of its jurisdiction under section 91 of Act IX of 1850, and was that Court in error in refusing to receive the evidence tendered"?

It is perfectly settled that under section 91 of that Act, a Presidency Town Court of Small Causes cannot try a question of adverse title. Thirty years ago it was so decided by the Supreme Court at Calcutta in *Hurymonee Dosee vs. Gopaulchandra Mookerji*⁽¹⁾. We have not any reason to believe that the soundness of that decision was ever questioned. This Court followed that case in 1877 in *Nowla Ooma vs. Bala Dhurmaji*⁽²⁾. But it has been argued that the adverse title set up by the defendant in such a suit, in order to exclude the jurisdiction of the Court, must be a title at law, and not any mere equitable defence. But section 25 of Act IX of 1850 enacts that "All suits where the debt or damage claimed or value of the property in dispute is not more than Rs. 500, whether on balance of account or otherwise, may be brought in the Court of Small Causes, and all such suits brought in the said Court shall be heard and determined in a summary way, and every defence which would be deemed good in the Supreme Court sitting as a Court of Equity

(1) Taylor & Bell, 57.

(2) I. L. R. 2 Bom. 91.

shall be a good bar to any legal demand in the Court of Small Causes." This, no doubt, is not a suit under section 25, but it will be perceived that the equitable defence permitted by section 25 does not appear to be confined to suits brought under that section. It is not there said that an equitable defence shall be a good bar in such suits as aforesaid, namely, in suits brought under that section, but that it shall be a good bar to any legal demand in the Court of Small Causes. The meaning of the word "demand" as used in Act IX of 1850 was considered by Peel, C.J., in *Radhamoney Boystomey vs. Anundomaye Dabey*⁽¹⁾. His observations have been transcribed in *Walji Karimji vs. Jaganath Premji*,⁽²⁾ in which latter case the meaning of the same word "demand," as well in Act IX of 1850 as in Act XXVI of 1864, was much considered, and it was held to comprise within its scope all suits in respect of immoveable property which might be brought under those Acts. The preamble of Act IX of 1850, as styled by Peel, C.J., or, more properly, its title, namely, "An Act for the more easy recovery of small debts and demands in Calcutta, Madras, and Bombay" was, under the term demands, regarded by him as referring to the recovery of things in specie,—chattels as well as lands and houses. Further, section 37 of Act IX of 1850 enacted that "the Judges of the Court shall be empowered to determine all questions as well of fact as of law or equity as are determined in the Supreme Court in all cases which they have authority to try."

Now, although those Judges have not authority finally to determine in cases under section 91 any question of adverse title, either legal or equitable, yet it is competent for a defendant in a suit under that section to set up an adverse title either legal or equitable in bar of the demand, *i. e.* the action. The Court of Small Causes cannot determine whether either of those titles is good, but it may and indeed must determine, in order to ascertain whether or not its jurisdiction to proceed with the suit is ousted, whether an actual question of title has been set up. The averment, by way of defence, of facts which do not amount to an allegation of title would not oust the jurisdiction under section 91: *Dadabhai vs. Kuverji*.⁽³⁾ The defendant in that case put forward the intention

1880.
LUCKMIDAS
KHIMJI
vs.
MULJI
KANJI.

(1) 2 Ind. Jur. 146.

(2) 1. L. R. 2 Bom. 88-89.

(3) 10 B. H. C. R. 386.

1880.

LUCKMIDÁS

KHIMJI

vs.

MULJI

KANJI.

of her husband to make a settlement on herself and her children. The Court, after saying that did not amount to an allegation of title, was careful to add: "It is no assertion of an agreement or contract or trust or other legal or equitable liability to convey to or hold the premises for the benefit of the defendant Kuverbái and her children." In speaking of section 91, Peel, C.J., says⁽¹⁾: "The value of possession where there is no title is so well known that it would be quite unreasonable to suppose that it had escaped the notice of the Legislature, or that, when they reserved to another tribunal or trial this decision of title, section 98 of Act IX of 1850, they meant to invert the position of the several claimants to displace one from the possession and to put in another whose claim, had he been in the position of a plaintiff, might not have been capable of proof, or might have been subjected also to some defect. In *Nowla Uma vs. Bala Dhurmaji*,⁽²⁾ the defendant whom it was sought to eject from a room in a house, was, as the defendant is here, attacked upon deeds executed by himself, namely, a mortgage and a further charge, to both of which he admitted signatures. He had formerly been, as the defendant was here, owner of the whole house. Neither of these documents had been set aside by a Court of competent jurisdiction, nor had a deed of sale executed under a power of sale contained in the mortgage. Thus far the two cases coincide. The defence in *Nowla Uma's* case was fraud in obtaining from the defendant the mortgage and deed of further charge. The late Chief Judge of the Small Cause Court held that to be such a defence as ousted the jurisdiction of his Court, and his view was affirmed by the High Court. The defence in the present case is that the mortgage, the sale, and the writing of attornment were all merely colourable, executed to screen the property from execution, that no money passed between the parties, that the defendant had never been out of possession of the portion of the property now claimed, and that the plaintiff has come into Court to ask it to aid him in turning his own wrong to his own advantage. It is difficult to suppose that the Legislature could by section 91 have intended to assist under such circumstances, as alleged here, a plaintiff, never in possession, to turn out the defendant and put him to his action on the title to recover the premises, and

(1) *Taylor & Bell*, 53-59.(2) *I. L. R.* 2 Bom. 91.

thus shift from the plaintiff to the defendant the burden of the attack. Were we to do so we think that we should act at variance with Sir L. Peel's view of the scope of that section and with the decision of this Court in *Nowla Uma* vs. *Bala Dhurmaji*.⁽¹⁾ It must be remembered that the parties are Hindus; and that if the defendant's case be true, the plaintiff has never had even a technical possession, inasmuch as the writing of attornment is a mere sham. Actual possession, either manual or by payment of rent, it is admitted that the plaintiff never had. It does not appear to us that it was the intention of the Legislature that, when a defendant makes such a contention as the defendant does here, the Court of Small Causes should use section 91 to give to the plaintiff an advantage which he never previously had, namely possession. The parties here are in *pari delicto* if the defendant's allegations be true, and, under such circumstances, even at law, *potior est conditio defendentis*. The plaintiff's counsel has relied on *Doe. d. Roberts* vs. *Roberts*⁽²⁾ to the contrary, but looking to the cases collected by Mr. Pitt Taylor in paragraph 80, page 108 of the first volume of his *Treatise on Evidence*,⁽³⁾ it seems doubtful that even in a Court of common law that case would now be followed. Where there was an action on a bond of fair aspect, but really given to induce a prosecutor of an indictment for perjury to withhold his evidence, Wilmot, C.J., said: "The manner of the transaction was to gild over and conceal the truth, and whenever Courts of law see such attempts made to conceal such wicked deeds, they will brush away the cobweb varnish and show the transactions in their true light:" *Collins* vs. *Blantern*.⁽⁴⁾ It is an indisputable proposition that as against an innocent party "no man shall set up his own iniquity as a defence any more than as a cause of action:" (Per Lord Mansfield: 1 Wm. Blackstone's Rep. 364.) Where, however, a contract or deed is made for an illegal or immoral purpose, a defendant, against whom it is sought to be enforced, may show the turpitude of both himself and the plaintiff, and a Court of justice will decline its aid to enforce a contract thus wrongfully entered into. The objection that a contract is immoral or illegal as between plaintiff and defendant sounds at all times very ill in the mouth of the defendant. It is not for

1880.

LUCKMIDÁS
KHMJJI
VS.
MULJI
KANJI.

(1) I. L. R. 2 Bom. 91.

(2) 2 B. & A. 367.

(3) 6th Edition.

(4) 2 Will. page 349.

1880.
 LUCKMIDÁS
 KHIMJI
 vs.
 MULJI
 KANJI.

his own sake, however, that the objection is ever allowed, but is founded on general principles of policy, which the defendant has the advantage of: (Per Lord Mansfield: Cowper's Rep. 343.) It is on this principle that defendants in suits on contracts, ostensibly *bond fide*, are permitted to show that those contracts really are mere wagering transactions. In *Ram Surun Singh vs. Mt. Pran Peary*⁽¹⁾ the Privy Council say: "It is impossible to treat this deed of conditional sale and mortgage as creating any estoppel. It is sought to be enforced by a person out of possession. It is, in truth, the case of a common mortgage on which the defendant says there never was the money advanced. It is open to a mortgagor in this country to deny that the money, the receipt of which is generally acknowledged under his hand and seal, was advanced, and to cut it down to a nominal sum or nothing. That being so, and the instrument being relied upon by a person out of possession seeking to obtain possession through the medium of a foreclosure suit, it appears to their Lordships that there is nothing whatever to prevent the defendant from showing the real truth of the transaction." As to the objection that a tenant may not deny his landlord's title, there is not any tenancy whatever between the plaintiff and defendant here if the latter's defence be true, and the plaintiff so far from being the landlord is the trustee of the defendant.

We think that the Small Cause Court was in this case deprived of jurisdiction under section 91 of Act IX of 1850 by the defence set up by the defendant. The judgment of that Court should be reversed and the suit should have been dismissed for want of jurisdiction.

The parties respectively should bear their own costs of the suit and reference.

Attorney for plaintiff—*H. W. Payne.*

Attorneys for defendant—*Hore, Conroy, and Brown.*

(1) 13 Moore's Ind. App. 551 at page 559.

CURSETJI RUSTOMJI SETNA, PLAINTIFF, VERSUS THOMAS
WILLIAMS, DEFENDANT.*

1880.
April 29.

Small Cause Court—Ship—Bill of lading—Charter-party—Incorporation in bill of lading of terms of charter-party—Cargo—Freight payable on intake measurement—Measurement at port of delivery—Discrepancy in measurements—Evidence—Burden of proof—Suit by consignee for excess freight.

K. V. at Moulmein consigned to the plaintiff at Bombay 135 logs of teak timber shipped on board the defendant's ship. The bill of lading, which was signed by the defendant, described the logs as marked K. V., and measuring tons 115-12-10-0, and it provided for the payment of freight thereon at Bombay at the rate of Rs. 17 per ton of fifty cubic feet on right delivery. The last clause of the bill of lading was in the handwriting of the defendant, and was as follows: "Marks, number, quantity and measurement unknown, all other conditions as per charter-party." The charter was expressed to be between the owners of the ship and Messrs. B. of Rangoon as charterers of the whole ship, and provided for the payment of freight, "at the rate of Rs. 18 per ton of fifty cubic feet for all timber one rate throughout, except 100 tons broken stowage at half freight, by intake measurement." On arrival of the ship at Bombay the plaintiff, as consignee of the timber and holder of the bill of lading, paid the defendant (the captain of the ship) Rs. 1,500 on account of freight and took delivery of the 13 logs. On measuring them he found that according to his method of measurement, the total measurement of the 135 logs came only to tons 58-27-11-6 and not tons 115-12-10 as mentioned in the bill of lading. He claimed, therefore, to be chargeable with freight only on the smaller quantity (viz. Rs. 995-8) and to recover from the defendant the difference (viz. Rs. 504-8-0) between that sum and Rs. 1,500 paid on account as for an overpayment of freight. It was proved that all the timber on board had been measured at Moulmein by an employé of the charterers, acting apparently as agents of all the different shippers, and that the measurement in the bills of lading were supplied by this person to the defendant as the measurements of the different consignments. It was also proved that the 135 logs received and measured by the plaintiff in Bombay were the same logs that were shipped under the bill of lading, and that the plaintiff's measurement of them was correct according to the mode of measurement which he adopted. There was no evidence as to what was the mode of measurement followed at Moulmein, nor, except the statements in the bill of lading, as to what was the actual intake measurement of the timber there.

Held, that the effect of the last clause in the bill of lading was to incorporate into that document the clause of the charter-party which provided that freight should be payable on the intake measurement; that the burden of proving what the intake measurement actually was, lay upon the plaintiff, who sought to recover back money which he alleged he had paid in excess of what was due; and that, in the absence of such evidence on behalf of the plaintiff, the statement of quantity contained in the bill of lading was *prima facie* evidence of the intake measurement of the timber.

* Reported at I. L. R. 5 Bom. 313.

1880.

CURSETJI
RUSTOMJI
SETNA
vs.
THOMAS
WILLIAMS.

CASE stated for the opinion of the High Court under section 7 of Act XXVI of 1864 by W. E. Hart, First Judge.

1. The plaintiff Cursetji Rustomji Setna sued Thomas Williams, the captain of the ship "Abyssinian," to recover the sum of Rs. 504-8-0 as an overpayment of freight under the following circumstances.

2. One Karani Viraswami at Moulmein consigned to the plaintiff in Bombay 135 logs of teak timber shipped on board the defendant's ship and covered by a bill of lading signed by the defendant.

3. The bill of lading, which is annexed hereto, described the 135 logs as marked K. V. and measuring tons 115-12-10, and provides for the payment of freight thereon at Bombay, at the rate of Rs. 17 per ton of fifty cubic feet on right delivery. The last clause of the bill of lading is in the handwriting of the defendant, to the following effect: "Marks, number, quantity, and measurement unknown, all other conditions as per charter-party."

4. The charter-party, which is also annexed hereto, is expressed to be between the owners of the ship and the firm of Messrs. Bhagvandás of Rangoon as charterers of the whole ship, and provides (*inter alia*) for the payment of freight at the rate of Rs. 18 per ton of fifty cubic feet for all timber, one rate throughout, except 100 tons broken stowage at half freight, by intake measurement.

5. On arrival of the ship at Bombay, the plaintiff, as endorsee and holder of the bill of lading and consignee of the goods mentioned therein, paid to the defendant Rs. 1,500 on account of freight, and took delivery of the 135 logs. On measuring them, however, he found that, according to his method of measurement, which was to measure the length, breadth, and thickness of each log separately, making no deduction for holes or fractures, the total measurement of 135 logs came only to tons 58-27-11-6 and not tons 115-12-10 as mentioned in the bill of lading. He claimed, therefore, to be chargeable with freight only on the smaller quantity, Rs. 995-8-0, and to recover from the defendant the difference between that sum and Rs. 1,500 paid on account (Rs. 504-8-0) as for an overpayment of freight.

6. It was proved before me that the ship took no part in the measurement of the timber at Moulmein, but that all the timber put on board was measured by an employé of the charterers, acting apparently as the agent of all the different shippers, and that the measurements in the bills of lading were those supplied by this person to the defendant as the measurements of the different consignments.

7. I also found as facts that the 135 logs measured by the plaintiff in Bombay were the same 135 logs as were shipped under this bill of lading, and that his measurement of them was correct according to the mode of measurement which he followed.

8. There was no evidence as to what the mode of measurement followed at Moulmein was, nor, except the statements in the bill of lading, as to what was the actual intake measurement there of this particular consignment. Neither party would apply for a commission to Moulmein for the purpose of ascertaining these particulars, each contending that the burden of proof lay on the other.

9. The following authorities were cited before me: *Maclachlan on Shipping*, page 430; *Tully vs. Terry*⁽¹⁾; *Buckle vs. Knoop*⁽²⁾; *Leggatt on Bills of Lading*, page 338; and *Christy vs. Ran*⁽³⁾.

10. I held, first, that the effect of the last clause in the bill of lading was to incorporate into that document the provision of the charter-party that freight was to be calculated on the intake measurement; second, that the burden was on the plaintiff to show that the intake measurement was tons 58-27-11-6 only; and third, on the authority of *Spaight vs. Farnworth*⁽⁴⁾ that the measurement by the plaintiff in Bombay afforded no criterion as to what was the intake measurement at Moulmein.

11. I accordingly directed a non-suit to be entered; but at the request of the plaintiff's pleader and on condition of the plaintiff depositing in this Court Rs. 50 to cover the costs of reference, and Rs. 34 the certified professional costs of the defendant in this case, the order for a non-suit was made subject to the opinion of the High Court on points of law to be stated by the plaintiff's pleader within three days.

1880.
CURSETJI
RUSTOMJI
SETNA
vs.
THOMAS
WILLIAMS.

(1) L. R. 8 C. P. 679.

(2) L. R. 2 Ex. 125.

(3) 1 Taunt. 300.

(4) L. R. 5 Q. B. D. 115.

1880.
 CURSETJI
 RUSTOMJI
 SETNA
 vs.
 THOMAS
 WILLIAMS.

12. These conditions have been complied with, and the points on which the plaintiff's pleader requires the opinion of the High Court are the following :

(1) Was not the burden of proving what was the intake measurement at Moulmein wrongly laid on the plaintiff, and should it not have been laid on the defendant ?

(2) Ought the measurement mentioned in the bill of lading to be taken to be the intake measurement at Moulmein ?

(3) Was not the Court in error in considering that the case of *Spaight vs. Farnworth*⁽¹⁾ was applicable to the present case ?

(4) Inasmuch as the bill of lading contained an express provision for the payment of freight, was not the Court in error in holding that the words in the last clause, " All other conditions as per charter-party," operated to incorporate into the bill of lading the provision in the charter-party that freight was to be calculated on the intake measurement ?

Farran for plaintiff.

Kirkpatrick for defendant.

JUDGMENT OF THE HIGH COURT (Sir C. Sargent and West, JJ.)

SARGENT, J.—The question in this case comes before us on a reference from Mr. Hart, the First Judge of the Small Cause Court, in a suit brought by the consignee of one hundred and thirty-five logs of timber, shipped in the " Abyssinian " at Moulmein for conveyance to Bombay, to recover a sum which he has paid to the captain of the ship, but which he alleges was in excess of the amount properly payable as freight. There is no dispute as to the actual timber which was put on board. The logs which were shipped appear to have been duly delivered at Bombay. The question turns on the measurement of the timber; the captain contending that by the contract of carriage the freight was to be calculated upon the intake measurement at Moulmein, and the consignor, on his part, contending that it is to be paid upon the actual measurement of the timber in Bombay, the port of delivery.

The " Abyssinian " was chartered in July 1880 by Messrs. Bhagvandás

(1) L. R. 5 Q. B. D. 115.

of Rangoon, and the charter-party contains the terms of the contract between them and the owners. The charterers subsequently proceeded to obtain cargo for the ship at Moulmein, and goods of various shippers were received on board. Among them was the timber in question, which was shipped by one Karani Viraswamy, and consigned to the plaintiff at Bombay.

The measurement of the timber put on board by the shipper at Moulmein is stated in the bill of lading to be upwards of 135 tons, but the plaintiff alleges that upon its arrival and delivery at Bombay he himself measured it and found the measurement to amount only something above 58 tons, and upon this quantity, and not upon the amount stated in the bill of lading, he contends that he is liable for freight. The bill of lading is as follows :

“Shipped in good order and condition by Karani Viraswamy in and upon the good ship or vessel called the ‘Abyssinian,’ whereof T. Williams is master for this present voyage, and now lying in the river Salevem and bound for Bombay—K. V. (135) one hundred and thirty-five teak squares measuring tons 115-12-10-0, being marked and numbered as per margin, and are to be delivered in like good order and condition at the aforesaid port of Bombay (all and every dangers and accidents of the sea and navigation of whatever kind or nature excepted) unto order or to his assignee, Freight for the said goods payable there at the rate of Rs. 17 (seventeen) per ton of fifty cubic feet on right delivery with average accustomed. In witness whereof the master or purser of the said ship or vessel hath affirmed to two bills of lading, all of this tenor and date, one of which bills being accomplished the rest to stand void. Dated in Moulmein, this 20th September 1880.

“Weight and contents unknown.

“Marks, numbers, quality, and measurement unknown.

“All other conditions as per charter-party.”

It is these last words added by the captain to the bill of lading which have raised the question we have to decide. The defendant contends that their effect is to incorporate into the bill of lading the various conditions of the charter-party, and amongst them, the condition which provides that freight is to be payable “for all timber one rate throughout (except 100 tons broken stowage at half freight) by intake measurement.”

Some reference was made in argument to the use of the word “conditions” in the written words at the foot of the bill of lading. We think, however, that it must be taken as equivalent to “terms,” and that the phrase “all other conditions as per charter-party”

1880.

CURSETJI
RUSTOMJI
SETNA
VS.
THOMAS
WILLIAMS.

1880.
CURSETJI
RUSTOMJI
SETNA
vs.
THOMAS
WILLIAMS.

means simply that, except where other and inconsistent terms are expressly mentioned in the bill of lading, the terms of the contract between the charterer and the shipper for the carriage of the timber are to be the same as the terms of the contract contained in the charter-party.

Now the bill of lading provides that the freight shall be payable at Bombay at the rate of Rs. 17 per ton of fifty cubic feet, but it states nothing as to the mode of measurement, nor does it indicate where the measurement is to be ascertained. When, however, we refer to the charter-party we find a term which expressly provides that the freight is to be payable "by intake measurement," and the case of *Spaight vs. Farnworth*⁽¹⁾ decides that intake measurement means the measurement actually taken at the port of shipment.

The port of shipment in the present case was Moulmein, and therefore the intake measurement upon which freight is made payable is the measurement actually taken at Moulmein.

Mr. Farran, however, urged that it was improbable that it was intended that freight should be payable upon measurement ascertained (as he said) by a servant of the charterers, whose object it would be to make the measurements as large as possible. But it appears that the person who measured at Moulmein, although an employé of the charterers, acted as agent of the shipper, and was therefore, we must assume, a person in whom the shipper had confidence. It is clear under these circumstances we cannot give much weight to the suggestion of improbability.

Mr. Farran also urged that the addition, by the captain, of the word "marks, numbers, quantity, and measurement unknown" operated to eliminate altogether from the bill of lading the statement of the quantity of timber shipped; that by these words the captain declined to be bound by the figures contained in the bill of lading, and that, therefore, the bill of lading was to be read as if it contained no measurement at all. But we do not think that the addition of the words "measurement unknown" has this effect. These words are added for a limited purpose, namely, to protect the captain from liability for short delivery, and as shown in the case of *Tully vs. Terry*,⁽²⁾ they do not nullify altogether the statement of quantity contained in the bill of lading.

(1) L. R. 5 Q. B. D. 115.

(2) L. R. 8 C. P. 679.

We are, therefore, of opinion that the effect of the words added by the captain to the bill of lading was to incorporate the clause of the charter-party which provided that freight should be payable on the intake measurement.

From the 5th paragraph of the case it appears that the plaintiff paid Rs. 1,500 to the defendant on account, but that now being of opinion that he has paid too much, he seeks to recover a part of that sum. He must, therefore, prove that he has paid too much, and to do so must, if he disputes the accuracy of the statement in the bill of lading, shew what the intake measurement really was upon which he is liable for freight. At the hearing, however, no evidence upon this point was given by the plaintiff, and he was, therefore, properly non-suited.

Of the questions referred to us, we answer the first in the affirmative, the second we answer in the affirmative,—as looking to the sixth and eighth paragraph of the case we think there was evidence that the statement of quantity in the bill of lading was the intake measurement, and this evidence was not rebutted by the plaintiff. To the third question we do not think it necessary to give any answer, and the fourth we answer in the negative.

WEST, J.—I am of the same opinion. Apart from the decided cases I should feel disposed to give to the disputed clause the effect which has been proposed by the plaintiff, and to hold that where the captain added such words as “weight, measurement &c. unknown” to a bill of lading, there is no agreement as to the quantity shipped on board. But the authorities which bind us have laid down that these words do not cancel the statement of quantity contained in the bill of lading, but that under their protection, if the captain deliver what was given to him, he is not bound by any clause in the bill of lading which purports to state the quantity of goods shipped. That being so, there is in this case some evidence that upwards of 115 tons of timber were shipped at Moulmein. The measurement appears to have been taken by some person acting as the agent of the shipper, and the taking of the bill of lading in this form argued that the same terms which were to govern the payment of freight as between the owners of the ship and the charterers upon the whole cargo should apply also as between the charterer and the shipper in respect of the payment of freight upon a particular portion of the

1880.

CURSETJI
RUSTOMJI
SETNA
vs.
THOMAS
WILLIAMS.

1880.

CURSETJI
RUSTOMJI
SETNA
vs.
THOMAS
WILLIAMS.

cargo. The shipper ran the risk of the measurement being incorrect. That, however, was his own doing, and cannot now affect the captain's clause. I think the bill of lading is *prima facie* evidence of the intake measurement upon which freight was to be paid, and I agree in the answers made to the questions referred to us.

Attorneys for plaintiff—*Nanu and Hormasji.*

Attorneys for defendant—*H. W. Payne.*

1881.

Dec. 10.

UDAYCHAND BUDAJI AND OTHERS, PLAINTIFFS, versus BHASKAR JAGONNATH AND ANOTHER, DEFENDANTS.*

Promissory note—Negotiable instrument—Material alteration.

An alteration which vitiates an instrument must be such as to cause the instrument on the face of it to operate differently from the original instrument. The alteration of the rate of interest in one of the clauses of a promissory note held to be a material alteration vitiating the note, although the clause so altered was a penal clause to which, even if unaltered, the Court would not give effect.

CASE stated for the opinion of the High Court under section 7 of Act XXVI. of 1864, by W. E. Hart, First Judge.

1. This was an action on a document, written in the Maráthi language and character, of the nature of a promissory note for Rs. 600 and interest, dated 15th October 1877, and payable ten months after date.

2. The portion of this document that is material for the purposes of this reference is to the following effect :

“In respect of these rupees we will continue to pay interest at the rate of annas eight per month per cent. As to the fixed period in respect of these rupees, we will pay off your rupees within ten months. Should the rupees remain unpaid beyond the fixed time, we will pay interest at the rate of rupees *two* (2) per cent per month.”

3. Both the word “two” and the figure “(2)” italicised in the last paragraph seem to have been altered from “one” and “(1)” respectively.

4. There are two endorsements on the note of payments made on account to the following effect :

“Two hundred. On the 9th day of June in the year 1888 Rs. (200) two hundred have been paid on account of this bond *on account of principal.* The handwriting of S. M. O.

* Reported at I. L. R. 6 Bom. 371.

"Two hundred. On the 10th day of August in the year 1880, rupees two hundred have been paid on account of this bond *on account of interest on this bond. The handwriting at the request of the party is of Sakharam Moroba.*"

5. The words above italicised are in each case noted by the translator as presenting the appearance of having been written subsequently to the rest of each endorsement.

6. The plaintiffs instituted this action on the 15th August 1881 for Rs. 605-9-7. Giving credit for Rs. 200 paid on account of the principal moneys of the note for Rs. 600, they charge Rs. 205-9-7 as interest, calculated at 6 per cent per annum for ten months from 15th October 1877 to 14th August 1878, and at 24 per cent per annum from 15th August 1878 to the filing of the suit.

7. The defendant at the hearing by their pleader admitted the making of the note on the 15th October 1877, but contended that it was now void by reason of material alterations having been made in it without their knowledge and consent. They also pleaded limitation (which plea was subsequently withdrawn), and contended they were not liable to pay penal interest at an enhanced rate.

8. The material alterations of which they complained were, first, the alteration of the enhanced rate of interest from one to two per cent per month as shown above in paragraphs 2 and 3, and second, the addition to the second endorsement which made it appear that the Rs. 200 paid on 10th August 1880 had been paid on account of interest, whereas they contended it had been paid on account of principal.

9. The plaintiff by his pleader consented to allow both the payments endorsed on the note to be taken as having been made on account of principal, and to admit (for the purposes of this suit only) that the alteration in the amount of the enhanced rate of interest from one to two per cent per mensem has been made without the authority of the defendants.

10. On these facts and admissions I held that the note was not void as against the defendants—first, because the alteration in the amount of the enhanced rate of interest was not a material alteration of the contract, and second, because the endorsements evidencing payments on account were no part of the contract.

11. I considered that a material alteration sufficient to avoid a contract must be such an alteration as materially alters not only the

1881.

UDAYCHAND
BUDAJI
VS.
BHASKAR
JAGONNATH.

1881.

UDAYCHAND
BUDAJI
vs.
BHASKAR
JAGONNATH.

wording of a term in the contract, but its legal effect : *Suffell vs. The Bank of England* ¹⁾. In the present case the alteration was in a term of the contract to which no effect could have been given even in its unaltered state, for, as originally written, it provided for the increase of the rate of interest from 6 per cent per annum to 12 per cent per annum as a penalty for non-payment of the amount due on the note within ten months of its execution. The defendants in contending generally that they could not be called on to pay penal interest at an enhanced rate, virtually compelled me to strike out of the note the whole clause providing for it, and the legal effect, or rather non-effect of that clause was not, in my opinion, changed by the alteration of an inoperative provision for the payment of interest at the increased rate of 12 per cent per annum, into an equally inoperative provision for the payment of interest at the increased rate of 24 per cent per annum.

12. With regard to the endorsements I was of opinion that as they were no part of the note originally executed by the defendants, an alteration in them could not be said to be such a material alteration in the contract as would entitle the defendants to avoid the note. These endorsements are evidence merely of the payment of certain sums on account of the note. Assuming the endorsements to have been subsequently altered, so as to make it appear that money paid as principal had been paid as interest, this might entitle the defendants to insist upon having the money applied as it was originally paid, but it would not, in my opinion, entitle them to decline to make any further payment on account of the note.

13. I therefore passed a verdict for the plaintiffs for Rs. 200 with interest at 6 per cent per annum, to be calculated, taking both payments endorsed on the note to have been made on account of principal, at the dates shown in the endorsements, and I certified the plaintiff's pleader's costs Rs. 15.

14. At the request of the defendant's pleader and because I felt myself some doubt on the first point, the above verdict was made subject to the opinion of the High Court on the two following questions :

(1) 7 Q. B. D. 270, per Lord Coleridge, C.J., at page 271.

Note.—This case was reversed in appeal subsequent to the judgment delivered by the First Judge. (9 Q. B. D. 555.)

(1) Is the alteration of the penal rate of interest in the note from one per cent per mensem to two per cent per mensem such a material alteration as to avoid the whole note?

(2) Are the endorsements of payment part of the contract between the parties?

15. The defendants have lodged in this Court the amount of the verdict and costs and the sum of Rs. 50 to meet the costs of this reference.

The parties did not appear in person or by counsel.

JUDGMENT OF THE HIGH COURT (Sir C. Sargent and Maxwell Melvill, JJ.).

SARGENT, J.—The conclusion to be drawn from the English authorities is that an alteration which vitiates an instrument must be such as to cause the instrument on the face of it to operate differently from the original instrument (*Davidson vs. Cooper*,⁽¹⁾ *Gardner vs. Walsh*⁽²⁾), or as it is expressed in *Suffell vs. Bank of England*,⁽³⁾ “must be one which alters or attempts to alter the character of the instrument itself, and which affects or may affect the contract which the instrument contains or is evidence of.”

In the present case the alteration effects a material change in the contract as it appears on the face of the instrument. But it is said that being in a penal clause to which the Court would not give effect, however intrinsically material it may be, it cannot be said to effect a change in the operation of the instrument. The clause, however, is not void *ab initio*. It operates according to its plain language until relieved against by a Court of Equity, or possibly treated as a penalty by a Court of Law, in an action brought on the instrument. It is further to be remarked that the relief in such cases turns upon very fine distinctions, and is, therefore, necessarily uncertain, as at once appears from a comparison of the cases reported in 6 B. H. C. R. 8; 2 Mad. H. C. R. 451; 2 Cal. L. R. 202; and L. R. 2 Eq. 221.

To hold that the alteration under such circumstances is immaterial would, we think, be contrary to the spirit of the rule as stated by Lord Denman in delivering the judgment of the Exchequer Chamber

1881.

UDAYCHAND
BUDAJI
VS.
BHASKAR
JAGONNATH.

(1) 13 M. & W. 343.

(2) 5 E. & B. 83.

(3) 7 Q. B. D. 270.

1881.

UDAYCHAND
BUDAJI
vs.
BHASKAR
JAGONNATH.

in *Davidson vs. Cooper*⁽¹⁾. "The strictness of the rule" he says "on this subject as laid down in *Pigot's* case can only be explained on the principle that a party who has the custody of an instrument made for his benefit is bound to preserve it in its original state. It is highly important for preserving the purity of legal instruments that this principle should be borne in mind and the rule adhered to. The party who may suffer has no right to complain since there cannot be any alteration except through fraud or laches on his part."

The reasoning of the Court in *Anandji Vishram vs. Nadiad Spinning and Weaving Company*,⁽²⁾ where the circumstances were analogous to those under consideration, has a close bearing on the present case. The Court was there asked to hold an alteration in the Memorandum of Association of the Company, which was in its nature material, to be immaterial on the ground that the alteration was illegal. The Court, however, refused to do so on the ground that the plaintiff's position was practically altered by the fact that he would have to resort to legal proceedings to be protected from it, if attempted to be enforced against him, and, further, that the nature of his remedy was far from clear. The nature of the remedy, it is true, is not open to doubt in the present case, but the result of its application can scarcely be said to be otherwise. We think, therefore, that the first question referred to us should be answered in the affirmative which renders it unnecessary to answer the second question.

Plaintiff to pay costs of reference.

1881.

Dec. 10.

venu, PLAINTIFF, versus KURYA NARAYAN, DEFENDANT.*

Malicious prosecution, action for—Reasonable and probable cause—Effect of order of discharge of a person accused of an offence before a Magistrate—Presidency Magistrates' Act IV. of 1877, sections 87, 121, 122.

The discharge of an accused person by a Presidency Magistrate under section 87 of the Presidency Magistrates' Act IV. of 1877 is a such a termination of the prosecution as entitles the accused to maintain an action for malicious prosecution.

CASE stated for the opinion of the High Court under section 7 of Act XXVI. of 1864 by W. E. Hart, First Judge.

(1) 13 M. & W. 343.

(2) I. L. R. 2 Bom. 331.

• Reported at I. L. R. 6 Bom. 376.

1. This was an action to recover the sum of Rs. 505 as damages for the malicious prosecution of the plaintiff by the defendant.

2. The defendant in this case charged the plaintiff, her mother, and sister, with the theft of a gold watch-chain from the room of the defendant, and with theft of nine copper pots, a bed, a sheet, and a piece of red cloth from the room of his daughter in the opposite house.

3. The Police after investigating this charge declined to take up the matter themselves, and referred the defendant to the Magistrate, who eventually granted a summons against the plaintiff alone for being in possession of property reasonably suspected of having been stolen, and failing to account satisfactorily for her possession of it.

4. The case was heard by Mr. Cooper, Senior Magistrate of Police, who, after taking the evidence of the defendant and all his witnesses for the prosecution, ordered the plaintiff to be discharged without calling on her to go into evidence in her defence, or framing a charge against her, in the manner provided in sections 121 and 122 of the Presidency Magistrates' Act IV. of 1877.

5. It does not appear, on the face of the Magistrate's notes (which were put in evidence before me), under what section of the Presidency Magistrates' Act (IV. of 1877) the order was made, but I presume it must have been under section 87, which occurs in chapter 8, headed "Of inquiry into cases triable by the High Court." Explanation 2 of this section provides that a discharge is not equivalent to an acquittal and does not bar the revival of a prosecution for the same offence.

6. The present action was then instituted in the Small Cause Court. I found that there was no reasonable and probable cause for the prosecution of the plaintiff by the defendant, inasmuch as all the articles which he had accused her first of having stolen, and then of having in her possession unlawfully, were her own, and had, in fact, been presented by him to her while she was in his keeping. I also found that there was express malice, as it appeared to me that the prosecution had been instituted in consequence of the plaintiff having left the protection of the defendant on account of a severe beating inflicted on her by him in the course of a quarrel which took place between them shortly after the defendant had brought home his newly married bride.

1881.

VENU

7th.

KURYA
NARAYAN.

1881.
 VENU
 vs.
 KURYA
 KARAYAN.

7. The pleader for the defendant, however, contended that no action of malicious prosecution would lie, as the Magistrate's order of discharge had not finally disposed of the prosecution, and could not, therefore, be said to be a determination in the plaintiff's favour of the proceedings before him. I was of opinion that such an order was analogous to the throwing out of a bill by the grand jury in England when an action for malicious prosecution can be maintained; though there is nothing to prevent another indictment being preferred at the next assizes: Roscoe's N. P. Evidence (12th edition, page 770). I also considered that such an order was in fact a final determination in the plaintiff's favour of that prosecution, especially if regard be had to the fact that up to the present time no attempt has been made nor intention alleged to revive the prosecution. The revival contemplated in the explanation above cited could not now take place without the issue of a fresh summons, or of a notice equivalent to a summons to the plaintiff: and no Magistrate who had once discharged a prisoner on the ground that no sort of *prima facie* case had been made against him on the evidence then adduced for the prosecution, would after so long an interval issue such fresh summons, or notice, without a satisfactory explanation by the prosecutor detailing the additional evidence he was prepared to adduce and showing why he was not able to adduce it before. Such a revival would therefore be in fact another prosecution in which the prosecutor might or might not be successful, but, at any rate, until he succeeded in it he would still remain liable for having recklessly instituted the former prosecution in which he so signally failed under circumstances that raised a strong presumption that in instituting it he had no reasonable or probable cause, and was actuated by malice. Lastly, it seemed to me that the effect of the contention by the defendant's pleader was virtually this:—The more utterly groundless and malicious the criminal charge may be, the less chance shall the person injured thereby have of his civil remedy. According to the argument of the defendant's pleader there could be such a final determination of the prosecution as would entitle the accused person to maintain an action for malicious prosecution only in one of two cases, namely, on withdrawal of the prosecution by permission of the Magistrate under section 125 or on acquittal under section 126. In the case of a malicious

prosecution there would, of course, be no withdrawal. So that, according to the defendant's pleader, it can only be on acquittal under section 126 of a case tried by the Magistrate that an action could be maintained in respect of a prosecution maliciously instituted before him. Section 126 occurs in chapter 9 of the Act, which is headed "Of the trial of cases by Presidency Magistrates." Section 116 in the same chapter provides that in cases in which the Magistrate has power to impose imprisonment for a term exceeding six months as he had in this case, there shall be a formal charge to be drawn up in accordance with the terms of chapter 9, but section 122 seems to justify the postponement of the drawing up of the final charge until the Magistrate is of opinion that a *prima facie* case has been established against the accused. Until the charge has been drawn up and the prisoner has pleaded to it, as provided in section 122, it seemed to me no "trial" could be said to have commenced, and the order of acquittal contemplated in section 126 can only be made in case of a "trial." Where, therefore, as in the present instance, the case never reaches the stage of "trial," because the Magistrate is of opinion that no sufficient *prima facie* case has been made out to warrant the framing of a charge, it seemed to me the Magistrate's only course, after having once granted the summons,⁽¹⁾ was to discharge the prisoner. It appeared, then, absurd to say that because he did not frame a charge for which he saw no *prima facie* ground and go through the farce of trying a charge which in his opinion was unsustainable for the sake of recording an order of acquittal, the person injured by the preferment of a baseless accusation was to have no remedy in the shape of an action for malicious prosecution. On the same principle, a malicious prosecutor might put his victim to all the disgrace, expense, and trouble of a criminal prosecution, and then avoid the consequence of his own ill-doing by absenting himself from the Magistrate's Court on the day of an adjourned hearing, when under section 118 or section 124 the complaint would simply be dismissed.

8. I accordingly passed a verdict in favour of the plaintiff for Rs. 280 and costs and certified her pleader's costs Rs. 51; but at the request of the defendant's pleader and on the deposit by the defendant

1881.

VENTU

28.

KURYA

NARAYAN.

(1) Presidency Magistrates' Act IV. of 1877, sections 32 and 33.

1881.

—
 VENU
 VS.
 KURYA
 NARAYAN.

in this Court of the amount of the verdict and costs and Rs. 50 as costs of the reference, the verdict was made subject to the opinion of the Judges of the High Court on the following question :

Was the discharge of the plaintiff by the Magistrate such a termination of the prosecution as entitles her to maintain an action for malicious prosecution ?

9. If the answer to this question is in the affirmative, the present verdict will stand ; if in the negative, the verdict for the plaintiff will be set aside and an order for non-suit be entered.

The defendant did not appear in person or by counsel.

JUDGMENT OF THE HIGH COURT (Sir C. Sargent and
 Maxwell Melvill, JJ.).

SARGENT, J.—We answer the question in this case—namely, was the discharge of plaintiff by the Magistrate such a termination of the prosecution as entitled her to maintain an action for malicious prosecution—in the affirmative.

1883.
 Jan. 12.

THE BOMBAY TRAMWAY COMPANY, LIMITED, PLAINTIFFS,
 VERSUS KHAIRAJ TEJPALL, DEFENDANT.*

Master and servant—Liability of master for negligence of servant—Bailor and bailee—Proprietor and driver of public conveyance—Bombay Act VI. of 1863.

The plaintiffs sued the proprietor of a buggy for damages sustained by them by reason of the negligence of the driver of the buggy. It was proved that the arrangement between the defendant and the driver was that the driver should be entrusted with the buggy and the use of two horses for the day to be used entirely at the driver's discretion for the purpose of plying for hire. The driver was to pay three rupees a day for the use of the buggy and horses. All that he made above that sum was his perquisite for his labour, and any deficiency he had to make good.

Held, that the relation between the proprietor and driver of the buggy was that of master and servant and that the proprietor was liable for the driver's negligence.

The relation between the proprietor and driver of a public conveyance established by Bombay Act VI. of 1863 is similar to that existing in England under the English Acts.

CASE stated for the opinion of the High Court under section 617 of the Code of Civil Procedure (Act X. of 1877) by N. Spencer, Acting First Judge.

* Reported at I. L. R. 7 Bom. 119.

1. This was an action brought by the Tramway Company against the defendant to recover damages according to the following particulars of claim:—"For that your buggy-driver Sullemán Hussen did, on the 16th April 1882, at about 9-30 P.M., carelessly and negligently drive your buggy along the Parel Road, so that it ran against one of the plaintiffs' horses at that time harnessed to plaintiffs' car No. 77, whereby it sustained injuries terminating in tetanus, which caused its death on the 30th April 1882, to the damage of the plaintiffs of Rs. 462."

2. The defendant holds a license from the Commissioner of Police under section 2 of Act VI. of 1863 to keep and let on hire public conveyances, and is the owner of the buggy and horse which caused the accident.

3. The driver of the buggy also held a license from the Commissioner of Police under section 3 of the same Act.

4. It was proved before me that when the accident occurred the driver of the buggy was drunk and driving recklessly between the tramway rails. Although warned, he neglected to pull up and collided against the horse, the car being at the time stationary to pick up a passenger. One of the shafts of the buggy entered the horse's chest and the horse died some days afterwards from the injuries he then received. The driver, it was stated, has since absconded from Bombay.

5. The arrangement between the defendant and the driver was that the driver should be entrusted with the buggy and the use of two horses for the day, to be used entirely at the driver's discretion for the purpose of plying for hire. The driver was to pay three rupees a day for the use of the buggy and horses, all that he made above that sum was his perquisite for his labour, and any deficiency he had to make good.

6. On behalf of the defendant it was contended by Mr. Gilbert that under the above arrangement the relation between the owner of the buggy and the driver was that of bailor and bailee, and not of master and servant, and that, therefore, the defendant was not liable for negligence of the driver. Mr. Gilbert cited the cases of *Powles vs. Hider*,⁽¹⁾ *Fowler vs. Locke*,⁽²⁾ and *Venables vs. Smith*,⁽³⁾ and he argued that in England, where the cab-owner has been held

1883.

BOMBAY
TRAMWAY
COMPANY
vs.
KHAIRAJ
TEJFALL.

(1) L. J. 25 Q. B. 331. (2) L. R. 7 C. P. 272. (3) L. R. 2 Q. B. Div. 279.

1883.

BOMBAY
TRAMWAY
COMPANY
vs.
KHAIRAJ
TEJPALL.

liable for the negligence of the driver, the decisions were based on the English Hackney Carriage Acts, the provisions of which alter what would otherwise be the relation of the proprietor and driver, and for the protection of the public produce the result that, as regards mischief done by the driver who is selected by the proprietor, the relation of master and servant so far exists as to render the proprietor responsible for the acts of the driver. Mr. Gilbert contended that, independently of the Acts of Parliament, the proprietors would not have been held responsible and that as there was no similar provision in the Bombay Act (VI. of 1863) for the regulation of public conveyances the defendant in this case was not liable.

7. I was of opinion that the judgment of the Court of Queen's Bench in *Powles vs. Hider*⁽¹⁾ was based on two grounds: first, on the ground that the arrangement between the proprietor and driver was merely a mode of remunerating the driver for his services, and did create the relation of master and servant; and secondly, on the ground that the Acts of Parliament also made the owner liable to the public for the negligence of the driver. The first of these grounds appeared to me to have met with the approval of Willes, J., in *Fowler vs. Locke*⁽²⁾ and of Mellor, J., in *Venables vs. Smith*.⁽³⁾ Following the decision in *Powles vs. Hider* I gave judgment for the plaintiffs for Rs. 442, the damages proved, and on the application of the defendant's advocate that judgment has been given contingent on the opinion of the High Court on the following question:

Was the driver of the buggy under the circumstances above set out the servant of the defendant, and is the defendant liable for his negligence?

Farran for plaintiff.

B. Tyabji for defendants.

JUDGMENT OF THE HIGH COURT (Sir C. Sargent, C.J.,
and Melvill, J.).

SARGENT, C.J.—We think the questions put to us by the First Judge of the Small Cause Court must be answered in the affirmative, and that the proprietor of the buggy is liable in this suit.

(1) L. J. 25 Q. B. 331.

(2) L. R. 7 C. P. 272.

(3) L. R. 2 Q. B. Div. 279.

In *Fowler vs. Locke*,⁽¹⁾ Willes, J., stated that the effect of the corresponding Acts in force in England upon the subject was to recognize and stamp upon the transaction the character of an employment in which the cabman is a servant, and to make the proprietor liable for him as such. The question is whether there is any material difference between the English Acts and the Bombay Act VI. of 1863, which would justify us in holding that the relationship established here between the proprietor and the driver of a cab is different from that existing in England.

In *Powles vs. Hider*,⁽²⁾ Lord Campbell considered the effect of the English Statutes, and referred particularly to sections 23, 24, 27 and 28 of Stat. 6 and 7 Vic. c. 86, as showing that the driver of a cab was to be considered as the servant or agent of the proprietor for whom, in the exercise of his employment as driver, the proprietor was answerable. Now, although the language of the Bombay Act is not precisely the same as that of the English Act, we are of opinion that sections 26 and 27 of the former indicate the relationship which the Legislature intended to exist between the proprietor and the driver of a public conveyance as decidedly as the sections upon which Lord Campbell relies. Section 26 makes the proprietor as well as the driver liable for any offence committed by the driver in the exercise of his vocation. It requires the proprietor to appear and to produce the driver to answer the complaint, and section 27 provides that if a driver fails to pay any fine imposed upon him, the proprietor may be compelled to pay it. It appears, therefore, that the proprietor is liable for the driver, and the existence of that liability is only consistent with the relationship between them being that of master and servant.

We should not consider ourselves justified in departing from the English rulings on this subject, unless we could see that there was a substantial difference in the legislation of the two countries. It appears to us, however, that it is essentially the same, and that the present case is governed by the authority of *Powles vs. Hider*.⁽²⁾

Attorneys for plaintiff—*Tobin and Roughton*.

Attorneys for defendant—*Payne and Gilbert*.

1883.

BOMBAY
TRAMWAY
COMPANY
vs.
KHAIRAJ
TEJPAL.

(1) L. R. 7 C. P. at page 285.

(2) 25 L. J. Q. B. 331.

1883.
Aug. 24.

JAMES SCOTT, PLAINTIFF, versus JAMES FINLAY AND OTHERS,
DEFENDANTS.*

Shipping—Construction of bill of lading—Delivery in dock—"Landing or cranage charges"—Practice of dock to recover from consignee—Liability of shipowner.

Certain boilers consigned to the plaintiff in Bombay were shipped at Liverpool in two steamers belonging to the same owners, under two bills of lading, in these terms: "Shipped in good order and condition &c., to be delivered, subject to the exceptions and conditions hereinafter mentioned, in the like good order and condition from the ship's tackles (where the ship's responsibility shall cease) at the aforesaid port of Bombay" &c. One of the exceptions and conditions above referred to was as follows: "The shipowner shall have the option of discharging in dock, and of making delivery of the goods under the bills of lading either over the ship's side or from lighters, or a store-ship, or custom-house, or warehouse, at merchant's risk." Freight was prepaid in Liverpool.

On their arrival at Bombay the two steamers went into the Prince's Dock belonging to the Port Trust, and discharged the boilers by means of the Port Trust cranes on to the dock wharves. The plaintiff subsequently sent to remove the boiler but was not allowed by the Dock authorities to do so until he had paid to them various sums, amounting in the aggregate to Rs. 930, on account, as stated in the bill furnished to him by the Port Trust, of "landing charges" for the said boilers. The bills also contained certain additional charges for "whurfage." These the plaintiff was ready to pay, but the "landing charges" he paid only under protest and in order to get possession of the goods, and now sought to recover the same from the defendants, who represented the shipowners.

It was the practice of the Port Trust to recover these charges in all cases from the consignees of goods discharged in their dock, and the charge was said to be levied on all goods landed on the wharves of the dock, whether by the dock's cranes or by the ship's own tackles. The charge was incurred the moment the goods touched the wharf. In their rates sanctioned by Government, which by their Act the Port Trust were entitled to charge, this charge was called, not a "landing charge" but a "dock and cranage" charge. Had the plaintiff been given delivery of these goods in the stream, and afterwards himself landed them at any wharf belonging to the Port Trust in the Port of Bombay, the Port Trust would have sought to have made the same charge for allowing the goods to be landed, whether that was done by their appliances or not.

Held, that the shipowner and not the consignee were bound to pay these charges, they being in reality charges for work and labour done in and about the landing of the goods, an operation which, under the bills of lading, was within the duty of the shipowner.

Per LATHAM, J.—The ship having elected to discharge in the dock, it was her duty to land the goods on the wharf. Every charge which had to be incurred before that could be done, was a charge antecedent to deliver, and one, therefore, which must be paid by the shipowner.

* Reported at I. L. R. 7 B. 386.

CASE stated for the opinion of the High Court under section 63 of Act XIV. of 1882 by W. E. Hart, Chief Judge.

1883.

JAMES SCOTT

vs.

JAMES
FINLAY.

1. The plaintiff is an engineer in Bombay; and the defendants, as the agents here for the Clan line of steamers, were the agents for the steam-ships "Clan Murray" and "Clan Graham," belonging to that line. The defendants were sued with their own consent in the place of their principals, the owners of the steamers.

2. The plaintiff was the holder of two bills of lading. The first, dated 30th September 1882, was for three 16-ton boilers and nine smaller packages of lighter machinery per s. s. "Clan Murray," and the second, dated 28th October 1882, was for three 15-ton boilers and thirty smaller packages of lighter machinery per s. s. "Clan Graham."

3. These two bills of lading are both in the same form, and granted by Messrs. Cayzer Irvin and Company at Liverpool, on prepayment of the freight there by the shippers. The freight so paid in respect of the boilers was very greatly (in the case of those per s. s. "Clan Murray" 800 per cent, and in the case of those per s. s. "Clan Graham" 1150 per cent) in excess of the freight paid for ordinary cargo shipped in the same steamers.

4. The bills of lading provide that the goods therein respectively described are to be delivered, "subject to the exceptions and conditions hereinafter mentioned, in the like good order and condition, from the ship's tackles (where the ship's responsibility shall cease) at the port of Bombay." The only subsequent condition material to the present case is the eighth, namely, "The shipowner shall have the option of discharging in dock and in making delivery of the goods under this bill of lading, either over the ship's side or from lighters, or a store-ship, or custom-house, or warehouse, at merchant's risk."

5. On arriving at Bombay, the "Clan Murray" went into the Prince's Dock which belongs to the Port Trust, and there discharged at the Ibis wharf the plaintiff's three boilers, employing for that purpose the 100-ton crane belonging to the Port Trust.

6. The plaintiff presented his bill of lading of 30th September to the defendants, and they endorsed thereon an order for delivery addressed to the Port Trust. The plaintiff sent his mukadam with the bill of lading so endorsed to the Prince's Dock to obtain delivery

1883.

JAMES SCOTT
vs.
JAMES
FINLAY.

of his goods from the Port Trust. Before the Port Trust would allow the mukádam to remove the goods, they required him to pay their bill for Rs. 580-15-6. Of this sum Rs. 480 were charged in the bill as "landing charges" in respect of the three boilers, at the rate of Rs. 10 per ton; the mukádam being new to his work, paid the bill without objection and without consulting the plaintiff, and removed the goods. The plaintiff, on subsequently discovering how much his mukádam had paid as "landing charges" on the three boilers, objected that this was an expense not rightly charged to the consignee, and directed the mukádam to apply to the defendants for a refund of the sum of Rs. 480. This he accordingly did, but was refused by the defendants, on the ground that there was no special arrangement for the payment of this charge by the owners of the steamer.

7. In the meantime the "Clan Graham" arrived with the plaintiff's goods covered by his bill of lading of 28th October 1882. Precisely the same course was followed in reference thereto as above described in paras. 5 and 6, except that in paying the Port Trust bill, which amounted in this case to Rs. 517-8-0 (of which Rs. 450 were for "landing charges" in respect of the three boilers at the same rate of Rs. 10 per ton), the plaintiff's mukádam acting under the instructions for the plaintiff objected to, and finally paid under protest, the Rs. 450 "landing charges" on the three boilers, and was told by the Port Trust officials that this sum represented "cranage". The plaintiff then demanded from the defendants a refund of the two sums of Rs. 480 and Rs. 450, on the ground that they had been paid in respect of charges which ought to be borne by the ship. The defendants refused to make any refund in the absence of special arrangement at home that the ship should bear the charges, on the ground that, according to the Bombay custom, all goods are delivered from the quay by the Port Trust on the consignees paying "cranage or other dues."

8. The plaintiff had previously paid without objection charges similar to these in nature, but far less in amount, and even in the present case he has taken no objection to the "landing charges" in respect of other goods which were included in the same bill as that containing the item of Rs. 480. I find, however, that on former occasions he paid these charges in ignorance of their true nature

and without enquiry, as they were so small that it was not worth his while to raise inquiries and objections regarding them, and in the present case he objected only to the heavy charges of Rs. 480 and Rs. 450 made in respect of the boilers, not considering it worth while to contest the smaller charges made in respect of the lighter articles. There is, therefore, no inference to be drawn on this ground to the prejudice of the plaintiff, of any admission by him that the consignee is rightly liable for the landing charges or that the Port Trust were his agents to accept delivery from the ship and incur these charges in landing the goods.

9. The Port Trust recover all their charges in respect of goods discharged in the dock from the consignee and not from the ship. But this is for the convenience of the Port Trust themselves, as they hold the goods and the consignee must apply for them, whereas the ship may go away. The Port Trust therefore insist on their bill being paid by the consignee and leave him to recover from the owners of the ship if any of the charges contained in the bill of the Port Trust are such as should be borne by the ship according to the contract between the owners and the consignee.

10. The charges entered in respect of the boilers in the two bills of the Port Trust, under the head of "landing," are identical with those specified under the head of "dock and cramage" in the "special rates for boilers, machinery, railway plant, and materials," specified at page 31 of the book of "Rates to be charged at the Prince's Dock" published by the Port Trust on the 1st April 1882, and which were in force at the time of the delivery of his boilers to the plaintiff.⁽¹⁾

(1) *Special Rates for Boilers, Machinery, Railway Plant and Material:*

	Wharf- age.	Dock and Cran- age.	Total.
	Rs. a.	Rs. a.	Rs. a.
Up to $\frac{1}{4}$ of a ton	0 8	1 0	1 8
Over $\frac{1}{4}$ and not exceeding $1\frac{1}{4}$ tons.	0 12	1 4	2 0
" 1 " " 5 "	0 12	1 0	2 4
" 5 " " 8 "	0 12	2 0	2 12
" 8 " " 100 "	1 8	10 0	11 8

Machinery in pieces will be charged by measurement or weight at option of dock officers; if by measurement, forty cubic feet will be considered a ton. Articles not landed on the wharf but lowered into lighters will not be charged wharfage, but only dock and cramage rates, unless the weight is kept suspended for more than quarter of an hour.

1883.

JAMES SCOTT
vs.
JAMES
FINLAY.

1883.

JAMES SCOTT
vs.
JAMES
FINLAY.

11. The charges for "dock and cramage" described in the bills for the Port Trust as "landing," and amounting respectively to Rs. 480 and Rs. 450, were incurred by and for the convenience of the two steamers, the "Clan Murray" and the "Clan Graham" respectively.

12. The plaintiff now seeks to recover from the defendant as agents and representing the said two steamers the said two sums of Rs. 480 and Rs. 450 so paid by him as aforesaid to the Port Trust, on the ground that they were paid in respect of charges properly payable, not by him, but by the said two steamers before they could give him complete delivery under the terms of his bills of lading of his said boilers, the freight for which had been prepaid as in the third paragraph hereinbefore mentioned.

13. If delivery had been given to the plaintiff over the ship's side, and he had thereafter, with his own boat's labour and appliances, landed his boilers at any landing-place belonging to the Port Trust, the Port Trust would have sought to charge the plaintiff the full charge of Rs. 10 per ton, even though no crane belonging to the Port Trust should have been used by the plaintiff. But if delivery had been given to the plaintiff over the ship's side, he would not have landed the larger boilers in Bombay at all, but would have sent them by sea to Broach, and would thereby have avoided the payment of railway charges which he had paid for the carriage of the said boilers, and in that event he would have effected a saving of Rs. 200 on each boiler so sent by sea.

14. At the trial the defendants abandoned the contention set up by their correspondence as to the custom of the port of Bombay, and the only ground of defence taken was that there had been a complete delivery to the plaintiff under the terms of the bills of lading.

For lifting from the hold of a vessel and placing on dock half dock and cramage rates, but no wharfage fee will be charged.

Vessels occupying the crane berth only for the purpose of using the 100-ton crane will be charged a fee of Rs. 2½ for each working hour in addition to the cramage fees.

An additional charge of Re. 1 per ton will be made when articles require to be deposited on the wharf and afterwards lifted by the crane into trucks.

Boilers lifted out of a vessel on to the wharf for repair and then lifted back again will be charged full rates for the first operation and half rates for the second.

The rates specified in this book are those which were sanctioned by Government, as required by section 43 of the Bombay Port Trust Act, 1879, by Government Resolution No. 112 in the Marine Department, dated 6th March 1882.

15. The whole question between the parties, therefore, resolves itself into one of construction of the eighth condition in the bills of lading set forth in the fourth paragraph above. I was of opinion that the whole contract was distinctly enunciated in the bills of lading and no additional terms could be imported into it. By the bills of lading the defendants, representing the ship, were bound, in consideration of the freight they had received, to carry to Bombay, and there deliver his goods to the plaintiff, by which I understand putting the goods into the possession of the plaintiff with complete dominion and control over them. They had, no doubt, the right of exercising without consulting the plaintiff, an option with which he could in no way interfere, as to the place of delivery. They might either deliver to him in the stream over the ship's side, or they might go into dock and deliver to him at a wharf. But in either case, as I read the contract, the delivery must be complete and free. It was possible that, if the defendants had chosen to adopt the first course, the plaintiff might have been put to some expense if he had landed his goods in Bombay. But they did not so choose, and I was of opinion that it was idle to speculate on what might have been the result of an hypothetical case involving a second hypothesis, neither of which actually occurred. The defendants chose to adopt the second course for their own convenience and are unable to point out any term in their contract with the plaintiff which provides that the expense they incur by so doing shall be borne by the plaintiff, in addition to the very heavy freight which he has paid to the defendants to carry and deliver his boilers to him. I accordingly passed a verdict for the plaintiff for Rs. 930 and costs.

16. At the request of the defendant's attorney my judgment was passed subject to the opinion of the High Court on the following question:—Whether, on a true construction of the terms of the bills of lading held by the plaintiff, the delivery under the circumstances hereinbefore set forth, was a complete delivery to the plaintiff in accordance with the terms of the bills of lading? If the answer to this question is in the affirmative, my judgment will be reversed and a verdict will be entered for the defendants with costs. If the answer be in the negative, the present verdict will stand.

· *Farran* for defendants.

1883.
JAMES SCOTT
vs.
JAMES
FINLAY.

1883.

JAMES SCOTT
vs.
JAMES
FINLAY.

Jardine (Anderson with him) for plaintiff.

The following cases were cited :—*Petrococcino vs. Bolt*,⁽¹⁾ *Galliffe vs. Bourne*,⁽²⁾ *Gaudet vs. Brown*,⁽³⁾ *Manzetti vs. Smith*,⁽⁴⁾ *Bishop vs. Ware*⁽⁵⁾, *Meverstein vs. Barber*,⁽⁶⁾; *Angell on Carriers*, § 282.

JUDGMENT OF THE HIGH COURT (Bayley, A.C.J., and Latham, J.)

BAILEY, A.C.J.—The question referred to us for our opinion by the Chief Judge of the Small Cause Court is “Whether on a true construction of the terms of the bills of lading held by the plaintiff, the delivery, under the circumstances set forth in the case, was a complete delivery to the plaintiff in accordance with the terms of the bills of lading.” The bills of lading were two, but are identical in form. The goods “shipped in good order and condition are to be delivered subject to the exceptions and conditions herein provided, in like good order and condition from the ship’s tackles (where the ship’s responsibility shall cease)”. Then follow the exceptions and conditions referred to, only one of which is material to the present question, and that runs as follows: “The shipowner shall have the option of discharging in dock and of making delivery of the goods under the bill of lading, either over the ship’s side, or from lighters or a store-ship, or custom-house or warehouse, at merchant’s risk.” The answer to the question referred to us depends on whether certain charges called “landing charges” or “cranage charges” which the consignee was required by the Port Trust to pay before he could remove his goods, are charges which, as between the consignee and the shipowner, the shipowner and not the consignee was bound to pay. I am of opinion that, under the provisions of these bills of lading, and under the circumstances found by the case, those charges were charges which the shipowner and not the consignee was bound to pay, and that, therefore, the judgment of the Small Cause Court was right. The shipowner has it in his own power under these bills of lading to discharge in the dock, or in the stream, as he thinks fit. Consulting his own convenience he goes into the dock, and employs the dock’s cranes to land the goods. This was work which the shipowner was

(1) L. R. 9 C. P. 355. (2) 4 Bing. N. C. 314. (3) L. R. 5 P. C. at page 160.

(4) W. N., June 19, 1883. (5) 3 Camp. 360. (6) L. R. 2 C. P. 50.

bound by the bill of lading himself to perform, for his responsibility did not cease till the goods were delivered from the ship's tackles. These boilers were heavy goods, but on that very account the freight charged was exceptionally high. They are landed by the only crane in the dock capable of landing them. This was done solely at the request of the shipowners and for their convenience. Where is there any evidence of any agreement, express or implied, on the part of the consignee to pay the charges so incurred? In my opinion, they were charges incurred at the request and expense of the shipowners. One test is, on whom—on the consignee or on the shipowner—would the loss have fallen had the goods been damaged while in the process of being lifted out of the ship to be deposited on the wharf? The American case *DeMott vs. Laraway*⁽¹⁾ cited by Mr. Angell in his Work on Carriers (§ 282) is exactly in point and shows that the loss in that case would have fallen on the shipowner. That indicates that the Port Trust were the agents of the shipowners to do what the shipowners were bound to do by the bill of lading, namely deliver the goods. It is true the practice in this dock has been for the Port Trust to obtain payment of these charges, as well as other charges for wharfage &c. from the consignees, but that is a rule made solely for their own convenience as the case finds—the goods always being there while the ship may go away—and cannot affect the question of the ultimate responsibility for the charge as between the shipowner and the consignee. The consignee pays it, in the first place, in order to get the goods, but if the charge is one, as in my opinion it is in this case, which, under the bill of lading, rightly falls on the shipowner, the consignee is entitled to recover back from the shipowner whatever has been so paid to the Port Trust. Freight in this case was paid in advance, but suppose it had been the ordinary case of freight payable on delivery, where payment and delivery are concurrent acts, could the shipowner have claimed that he had earned the freight by such a delivery as this, not to the consignee, but to the Port Trust? Or could he have claimed to have retained a lien on the goods, not only for the freight agreed on, but for the “landing charges” as well? It is clear, I think, that he could not. The answer, therefore, which I return to the question referred to us by the learned Judge of the

1886.

JAMES SCOTT
vs.
JAMES
FINLAY.

(1) 14 Wend. 225.

1886.

JAMES SCOTT

vs.

JAMES

FINLAY.

Small Cause Court is, that, on a true construction of the terms of the bills of lading, the delivery, under the circumstances set forth in the case, was not a complete delivery to the plaintiff, in accordance with the terms of the bills of lading. The present judgment will therefore stand.

LATHAM, J. — I agree with the Chief Justice. Mr. Farran's argument is really based upon the existence of a usage, or custom, in this dock, with reference to which the parties must be supposed to have contracted. But this argument is not open to him on the case as stated by the learned Judge of the Small Cause Court. Moreover, if it were, I am by no means prepared to admit that such a custom,—a custom affecting the question of the amount to be paid for delivery—even if proved could affect the contract between the parties as contained in the bills of lading. Such a custom would be of a very different nature to those proved in the cases cited by Mr. Farran. The question in this case is, after all, a simple one. The ship having elected to discharge in the dock, it was her duty to land the goods on the wharf. It seems to me that the shipowner must pay every charge which has to be incurred before this is done. That was the principle of the decision in *Bishop vs. Ware*.⁽¹⁾ These charges, whatever they were and whether they could have been avoided or not, were charges incurred at the moment that the goods touched the wharf; they were necessarily, therefore, charges incurred antecedently to delivery to the consignee. I think that consideration is sufficient to show that the liability for these charges must fall upon the shipowner. But, in truth, the charges would seem to have been charges in respect of work and labour done in and about the lifting and landing of these boilers. I think that appears clearly enough from the book of rates which the Port Trust issue to the public for their information and guidance. This charge is there called "a dock and cranage" charge. Half this "dock and cranage" charge and no "wharfage" is charged for "lifting from the hold of a vessel and placing on the dock." "Boilers lifted out of a vessel on to the wharf for repair, and then lifted back again, will be charged full rates for the first operation and half rates for the second." From these passages alone it is clear, I think, that

(1) 3 Camp. 360.

it is the work done by the dock cranes and appliances that is the subject of this charge. If that is the real character of these "landing" or "dock and cranage" charges, then it cannot be contested but that they are charges which must be defrayed by the ship. The judgment of the learned Judge of the Small Cause Court was therefore, in my opinion, right, and the verdict for the plaintiff must stand. Defendants to pay the plaintiff their costs of this reference.

Attorneys for plaintiff—*Craigie, Lynch, and Owen.*

Attorneys for defendants—*Prescot and Winter.*

1886.

JAMES SCOTT
vs.
JAMES
FINLAY.

LEGEYT, PLAINTIFF, versus HARVEY AND ANOTHER, DEFENDANTS.*

*Delivery order—Effect of endorsement of—Vendor's lien—Indian
Contract Act (IX. of 1872), section 108.*

1884.

July 2.

The plaintiff was a broker in cotton and also traded in cotton on his own account. On the 27th January 1883 he contracted with the defendants to sell to them one hundred khandis of cotton at Rs. 200 per khandi deliverable from the 15th to the 25th April following. On the 30th January 1883, in his capacity as broker, he effected a contract for the sale of the same hundred khandis of cotton by the defendants to L. & Co. at Rs. 202 per khandi.

L. & Co. sold the cotton to D., and D. again sold it back to the defendants at Rs. 191 per khandi. The defendants then sold it to H., by whom it was sold to K., and K. finally sold it to B. & Co. at Rs. 191 per khandi. B. & Co. obtained possession of the cotton from the plaintiff on or about the 24th April on payment of Rs. 191 per khandi, for which they had contracted to buy it from K.

The delivery order for the cotton had been sent on the 20th April by the plaintiff to the defendants, who immediately on receiving it, wrote to the plaintiff as follows:—
"We beg to ask *pro forma* for survey on one hundred bales M. G. Broach cotton tendered by you to us to-day. As we are handing over the delivery order to a third party, please secure payment for the cotton direct, and before parting with the cotton, if necessary." The delivery order was then endorsed by the defendants to their vendees (L. & Co.), who in turn endorsed it to D., by whom it was endorsed to the defendants. By subsequent endorsements it came ultimately to B. & Co., who, as above mentioned, got delivery of the cotton from the plaintiff on payment of Rs. 191 per khandi.

The plaintiff, who had sold to the defendants at Rs. 200 per khandi and who received from B. & Co. only Rs. 191 per khandi, sued the defendants in the Small Cause Court for the difference.

The defendants contended that after the receipt of the letter written by them to the plaintiff he was bound to deliver the cotton L. & Co. or to any subsequent endorsee of the delivery order, until he had obtained payment of the full price (Rs. 200 per khandi) which the defendants had agreed to pay him for it; that the delivery to B. &

* Reported at I. L. R. 8 Bom. 501.

1884.

LEGENT
vs.
HARVEY.

Co. was not a delivery authorized by the defendants; that the payment made by B. & Co. to the plaintiff was not a payment made by or on behalf of the defendants; that the plaintiff's cause of action, if any, against the defendants was for the full price of the cotton, and that as that exceeded Rs. 2,000, the Small Cause Court had no jurisdiction.

Held, that the defendants' letter to the plaintiff was ineffectual to control or alter the course of the delivery order, and that the plaintiff was bound to deliver the cotton to B. & Co. on payment by them of the price of Rs. 191 per khandi. The defendants having repurchased the cotton after it had passed through several hands sold it for Rs. 191 per khandi to H., from whom it ultimately passed to B. & Co. The plaintiff's lien, therefore, as regarded H. and his sub-vendees, was confined to the price at the above rate, and B. & Co. were entitled to the goods as against the defendants on payment of that price. The defendants' letter, therefore, of the 20th April 1883—however the plaintiff might have been bound to act on it as regarded L. & Co., to whom the cotton was sold at Rs. 202 per khandi, and the other sub-vendees prior to the repurchase by the defendants,—could only as regards subsequent purchasers prevent delivery to them before payment of the price at which the defendants had re-sold the goods, *viz.* Rs. 191 per khandi. That price was actually paid to the plaintiff before he did deliver the goods, and credit was given to the defendants in the account.

By the English common law a delivery order is regarded as a mere token of authority to deliver; and before the wharfinger has attorned, it does not, independently of statute or custom, enable the purchaser to confer a title upon a vendee or a sub-vendee free from the vendors' lien for the price.

The Indian Contract Act (IX. of 1872) gives no larger effect, except by section 108, to a delivery order than it had by English common law, and under that Act (section 90, *fil. (c)*, and sections 95 and 98), the giving of a delivery order by a vendor to a vendee does not of itself give the vendee such a possession of the goods as to defeat the vendors' lien. The exception to this rule contained in exception (1) to section 108, which provides that a seller may give to a buyer a better title than he had himself where he is, by consent of the owner, in possession of the goods or documents relating thereto, cannot be held to apply to cases where the possession is entirely beyond the control of the owner.

CASE stated for the opinion of the High Court under section 69 of Act XV. of 1882 by N. Spencer, Acting First Judge.

The plaintiff in this case seeks to recover from the defendants the sum of Rs. 658-1-6 as the balance of the price of one hundred khandis of cotton sold by plaintiff to the defendants.

The facts of the case are as follows:

The plaintiff is a broker in cotton, and also trades in cotton on his own account. On the 27th of January last he entered into a contract with the defendants to sell to them one hundred khandis of good machine-ginned Broach cotton at Rs. 200 per khandi deliverable from 15th to 25th April following. On the 30th of January the plaintiff, in his capacity of broker, effected a contract for the sale of the same parcel of one hundred khandis of cotton by the defendants to

Messrs. Lupi and Company at the price of Rs. 202 per khandi,—that is, at a profit of Rs. 2 per khandi.

On the 20th of April the plaintiff sent the defendant two orders for the delivery of the cotton, each order being for one hundred bales or fifty khandis.

These orders were put in at the hearing and marked A. and B. I held that the plaintiff was entitled to the sum of Rs. 236-4-0 claimed as due under order B., and gave judgment for the plaintiff for that amount. The defendants are not dissatisfied with my finding on this point, but the plaintiff has asked me to submit for the opinion of the High Court the question whether he is not entitled to the further sum of Rs. 421-13-6 claimed by him in respect of delivery order A.

It will be observed that the defendants endorsed the order, and made the cotton deliverable to Messrs. Lupi and Company or order. By Messrs. Lupi and Company it was endorsed to Devji Dossa and Company, to whom they had sold the cotton for less than Rs. 200 per khandi. By Devji Dossa and Company it was endorsed to Messrs. Harvey and Sabapathy, the defendants, who, according to the evidence, had contracted with Devji Dossa to buy cotton at Rs. 191 per khandi. By Messrs. Harvey and Sabapathy it was again endorsed to Hari Bhanji or order. By Hari Bhanji it was endorsed to Khimji Ratansi and by Khimji Ratansi it was endorsed to Messrs. Breul and Company, who took delivery of the one hundred bales of cotton from the plaintiff on or about the 24th April, and paid for it at Rs. 191 per khandi, the price at which they had bought from their immediate endorser Khimji Ratansi.

The delivery order, it will be seen from the series of endorsements, after having been made over to Lupi and Company by the defendants, came back to them in fulfilment of a separate contract to purchase which they had entered into with Devji Dossa and Company and was reissued by them. But the plaintiff was not aware that the order had been so returned to and reissued by the defendants until the order was delivered to him and delivery of the cotton taken by the last endorsees, Breul and Company, nor did he know at what price the defendant had contracted to buy from Devji Dossa.

Immediately on receiving the delivery order A., the defendants wrote a letter to the plaintiff, of which the following is a copy :

1884.

LEGEXT
VS.
HARVEY.

1884.
LEGEYNT
vs.
HARVEY.

"We beg to ask *pro forma* for survey on one hundred bales good M. G. Broach cotton tendered by you to us to-day. As we are handing over the delivery order to a third party, please secure payment for the cotton direct, and before parting with the cotton, if necessary.—Yours &c.,

P. Pro HARVEY & SABAPATHY.
NARAYAN DHONDIBA."

Mr. Narayan Dhondiba, who represents the defendants, stated that his reason for writing this letter was that he was not satisfied as to the pecuniary position of Lupi and Company, to whom he was about to transfer the order. This circumstance, however, was not communicated to the plaintiff, and the plaintiff in his evidence stated that he was not aware that the defendants had any doubts as to the position of Lupi and Company.

The sum of Rs. 421-13-6 claimed by plaintiff is the difference between the rate of Rs. 200 per khandi, at which the defendants had contracted to buy these fifty khandis of cotton and Rs. 191 per khandi, the rate at which the plaintiff has received payment from Breul and Company.

On behalf of the plaintiff it was contended by Mr. Macfarlane that it was the custom in Bombay to make deliveries of cotton under orders endorsed, as is the order in the present case, to the last endorsee, if he were a respectable merchant, and to receive payment from him, at the rate at which he stated he had purchased, as a payment on account of the first purchaser without referring to or communicating with the first purchaser, and to prefer a bill against the latter for the difference. For the defendants it was contended by Mr. Owen that when the person taking delivery tendered payment at a lower rate than that at which the order was issued, it was the practice for the vendor who issued the order before giving delivery to ascertain from the first purchaser whether he could undertake to pay the difference, and to refuse to deliver if such an undertaking was not given. Mr. Owen further contended that after the receipt of the letter written by the defendants to the plaintiff, set out above, the plaintiff was bound not to deliver the cotton to Lupi and Company, or to any subsequent endorsee of the delivery order, until he had obtained payment for the cotton at the full price which the defendants had agreed to pay for it, and that, if the plaintiff was not bound to do so, the delivery to Breul and Company was not a deli-

very authorized by the defendants; that the plaintiff could not set off against the price of one hundred bales of cotton, which exceeded Rs. 9,000, the money he had received from Breul and Company, which was not a payment made by or on behalf of the defendants; that the plaintiff's cause of action, if any, against them was for the full price of the cotton, and as that exceeded the pecuniary jurisdiction of this Court, the Court had no jurisdiction to entertain the suit.

There was only one witness examined on each side, and I did not consider that either custom alleged was established. The question, therefore, which I had to decide was, what is the effect of transferring a delivery order by endorsement, and what is the liability of a person who puts such an order in circulation?

I held that the defendants having put the delivery order in circulation by making the cotton deliverable to Messrs. Lupi and Company or their order, the plaintiff would have been justified, in the absence of any directions as to the terms under which delivery was to be made, in delivering the cotton to Breul and Company, and treating any payment received from them as a payment on account of the defendants, and in holding the defendants liable for the difference: but that after the receipt of the letter of the 20th April the plaintiff (not being aware that the letter had reference to Lupi and Company) ought not to have delivered the cotton to Lupi and Company or to any subsequent endorsee without receiving from such endorsee the full price which the defendants had agreed to pay for the cotton or ascertaining from the defendants to whom he should look for the difference, and that this Court had jurisdiction to entertain the suit, as the payment made by Breul and Company must be regarded as a payment made by or on behalf of the defendants, and that the plaintiff was entitled to set off such payment against the entire price of the cotton.

For the reasons given above I was of opinion that the plaintiff was not entitled to recover the difference of Rs. 421-13-6 claimed by him in respect of delivery order A.

At the request of the plaintiff's attorney I submit the following questions for the opinion of the High Court:

(1) Whether under the circumstances of the case the defendants, having parted with and put into circulation the delivery order by the endorsement to Lupi and Company, or order, could by this letter to the plaintiff interfere with the negotiability of that order,

1884.
LEGHNT
vs.
HARVEY.

1884.
 LeGHEYT
 vs.
 HARVEY.

or attach a condition to it which did not appear on the face of the delivery order ; and whether the plaintiff was not justified in treating the letter as ineffectual to control or alter the ordinary course of the delivery order ?

(2) If it is held that the letter of the defendants to the plaintiff at all affected the delivery order, must it not be held that it was to have effect only in the event of Lupi and Company taking delivery of the cotton, and that it ceased to have any effect after Lupi and Company had parted with the order to another purchaser ?

(3) Whether in the face of the fact that the defendants were, the second time the delivery order came into their possession, the holders of the order at Rs. 191 per khandi, the same price at which Breul and Company took delivery and paid for the cotton, the plaintiffs should have refused to deliver to Breul and Company unless they paid at the original contract price, *i. e.* Rs. 200 ?

Inverarity for plaintiff.

There was no appearance for defendants.

JUDGMENT OF THE HIGH COURT (Sargent, C.J., and Bayley, J.)

In order to determine the first question referred for our decision, it will be well to consider how the law stood before the Indian Contract Act (IX. of 1872), upon the proper construction of which its solution turns. It is clear upon the English authorities that a delivery order is regarded as a mere token of authority to deliver, and that, before the wharfinger has attorned it does not, independently of statute or custom, enable the purchaser to confer a title upon a vendee or sub-vendee free from the vendor's lien for the price. *Farina vs. Home*,⁽¹⁾ *McEwan vs. Smith*.⁽²⁾

The English Factors' Acts (Geo. IV. c. 83, 6 Geo. IV. c. 94, and 5 & 6 Vic. c. 39) which were extended to this country by Acts of the Indian Legislature (Act XIII. of 1840 and Act XX. of 1844) created statutory exceptions to that rule in the case of "agents entrusted with" certain mercantile documents, *including a delivery order*. Again, the case of *The Merchant Banking Company vs. Phoenix*

(1) 16 M. & W. 119.

(2) 2 H. L. Ca. 309.

Bessemer Steel Company,⁽¹⁾ affords an illustration of the effects of a well-established mercantile custom qualifying the rule, the custom being held by Sir G. Jessel to be proved that the warrant in that case passed from hand to hand in the iron trade and gave a title to the goods free from any vendor's lien. The Indian Acts XIII. of 1840 and XX. of 1844 were repealed by the Indian Contract Act, and no custom has been proved in this case such as obtained in the case of *The Merchant Banking Company vs. Phœnix Bessemer Steel Company*.⁽²⁾

Passing to the Indian Contract Act, it is plain that that Act gives no larger effect except by section 108 to a delivery order than it had by English common law. Section 90, illustration (c), read with sections 95 and 98, shows that the giving a delivery order by a vendor to a vendee does not of itself give the vendee such a possession of the goods as to defeat the vendor's lien.

By section 108, however, it is provided that "no seller can give to the buyer of goods a better title to those goods than he has himself," except in the following cases, of which the first is as follows: "When any person is, by consent of the owner, in possession of any goods or of any bill of lading, dock-warrant, warehouse-keeper's certificate, or warrant or order of delivery, or other document showing title to goods, he may transfer the ownership of the goods of which he is so in possession or to which such documents relate, to any other person, and give such person a good title thereto, notwithstanding any instructions of the owner to the contrary, provided that the buyer acts in good faith, and under circumstances which are not such as to raise a reasonable presumption that the person in possession of the goods or documents has no right to sell the goods."

The language of this proviso is doubtless very general, and the omission of the expressions "agent" and "entrusted with" used in the repealed Factors' Acts doubtless gives the section a larger scope than those Acts possessed as construed by the Courts in England. We think, however, that it would be straining the expression "by consent of the owner" beyond its plain meaning if it were held applicable to cases where the possession is entirely beyond the control of the owner of the goods. Such would appear to have been the view

1884.
LEGEY
VS.
HARVEY.

(1) L. R. 5 Ch. Div. 205.

(2) L. R. 5 Ch. Div. 205.

1884.
LEGEYNT
VS.
HARVEY.

taken of the section by the Calcutta High Court in *Greenwood vs. Holgarth*⁽¹⁾, where Couch, C.J., says: "It is the kind of possession which a factor or agent has where the owner of the goods, although he has parted with the possession, may give instructions to the person in possession."

Since the Indian Contract Act became law in 1872, the English Factors' Act of 1877 (40 and 41 Vic. c. 39) has been passed which extends the operation of the earlier Factors' Acts to the case of a purchaser in possession of documents of title of goods, and would, doubtless, have deprived the defendants of their lien after parting with the delivery order.

If the above construction of section 108 of the Contract Act be thought inconvenient to the interests of commerce the remedy is to be found in the extension, by the Legislature, of the English Act of 1877 to this country as was done in the case of the earlier English Factors' Acts.

In the present case the defendants re-purchased the goods after they had passed through several hands and sold them for 191 rupees per khandi to Hari Bhanji, from whom they ultimately passed to Messrs. Breul and Company. Their lien, therefore, as regarded Hari Bhanji and his sub-vendees, was confined to the price at the above rate, and Messrs. Breul and Company were entitled to the goods as against defendants on payment of that price. The defendants' letter, therefore, of the 20th April 1883—however the plaintiff might have been bound to act on it as regards Lupi and Company, to whom the cotton was sold at Rs. 202 per khandi, and the other sub-vendees prior to the re-purchase by the defendants—could only, as regards purchasers subsequent to such re-purchase, prevent delivery to them before payment of the price at which the defendants had re-sold the goods, viz. Rs. 191 per khandi. That price was actually paid to the plaintiff before he did deliver the goods and credit was given to the defendants in the account upon which the plaintiffs are now suing.

Our answer to the first question must, therefore, be that the defendants, notwithstanding the endorsement of the delivery order, could by letter to the plaintiff control the delivery of the goods in virtue of their lien, but that, under the circumstances of this case, the plaintiff was justified in treating the defendant's letter as

(1) 12 Beng. L. R. 42.

ineffectual to stay the delivery after payment to him of Rs. 191 per khandi by Breul and Company. The third question is answered in the negative. It is, consequently, not necessary to answer the second.

Attorneys for plaintiffs—*Macfarlane and Edgelow*.

DAMJI MEGJI, SOMJI SEJPAL, SOMJI MEGRAJ, DOSSA PUNJA, NAGSI GHELLA, LALJI THOBAN, LILLADHAR CUTCHRA, AND RAMLAL CHATARBHUJ, CARRYING ON BUSINESS IN THE NAME AND STYLE OF DAMJI MEGJI AND COMPANY, PLAINTIFFS, versus A. HARVEY, CARRYING ON BUSINESS IN BOMBAY UNDER THE NAME OF HARVEY AND COMPANY, BY HIS CONSTITUTED ATTORNEY NARAYEN DHONDOBA, DEFENDANT.

1885.
July 31.

Contract—Acceptance—Unauthorised act of agent—Right of appeal to committee—Waiver—Notice—Rules 17, 21, of Bombay Cotton Trade Association.

Under a contract made subject to the rules of the Bombay Cotton Trade Association cotton was tendered for delivery. The purchaser having applied for a survey the arbitrators held that the cotton was a fair tender. The bales were then stamped by the purchaser's mukádam, but without the purchaser's authority. The purchaser within the time allowed by the rules preferred an appeal to the committee against the award of the arbitrators and their decision was reversed.

Held, that the purchaser was not bound by the unauthorised act of his mukádam, but that in any event he could not be held by reason of the stamping of the bales to have waived or lost his right of appeal.

Held also, that a notice from the purchaser to the plaintiffs, the vendors, that he had appealed against the award of the arbitrators was a sufficient repudiation of such award.

CASE stated for the opinion of the High Court under section 63 of Act XV of 1882 and section 617 of the Code of Civil Procedure, by N. Spencer, Acting Chief Judge.

1. In this suit the plaintiffs seek to recover from the defendants, Harvey and Company, the sum of Rs. 1,339 as damages for breach of contract in not taking delivery of 200 bales of machine-ginned Broach cotton of fine quality which they had agreed to purchase.

2. On the 8th of April 1884 the defendants agreed to buy from plaintiffs 200 bales of cotton of the above description and quality deliverable on or before the 15th April. The cotton was to be delivered by the plaintiffs on defendant's account to Messrs. Peel, Cassels, and Company, whose man, it was stipulated, should be at the press while the cotton was being pressed. Peel, Cassels, and Company are

1885.
DAMJI MEGJI
vs.
A. HARVEY.

the real defendants in this suit, and when their name is used, it must be understood that this is done as representing Harvey and Company.

3. On the 14th April the plaintiffs gave notice that the cotton would be pressed on the following day and required the purchaser's man to be present. Peel, Cassels, and Company's man accordingly attended at the press on the 15th and 16th April while the cotton was being pressed. On the 17th April a delivery order was sent by plaintiffs to Peel, Cassels, and Company. On the same day two of the bales were opened and samples drawn from them.

4. The plaintiffs, defendants, and Messrs. Peel, Cassels, and Company are members of the Bombay Cotton Trade Association. The rules of that association provide for the mode in which disputes between sellers and buyers of cotton, who are members of the association relating to the description and quality of cotton contracted to be sold, shall be settled.

5. Rule 17 provides—"All questions in dispute between buyer and seller shall be referred to the arbitration of two disinterested persons, Europeans, members of the Association, or their nominated representatives, one to be chosen by each disputant, and the award made by such arbitrators shall be final and binding subject only to the right of appeal to the committee."

6. Rule 21 says—"In case either party shall be dissatisfied with the award, a right of appeal shall lie to the committee of the Association, provided it be claimed before twelve o'clock on the day next after the day on which the objecting party shall have notice of the award, and an award made and signed by at least two members of the committee and countersigned by the secretary shall be deemed to be the award of the committee, and shall in all cases be final."

7. The samples were drawn on the 17th of April by Ravji Sivji, the mukádam of Peel, Cassels, and Company. He communicated to Mr. Cassels his opinion as to the quality of the cotton. Acting on this opinion Mr. Cassels under rule 17 of the Association demanded an arbitration. Each party named an arbitrator. The arbitrators met at the rooms of the Association on the 17th of April and passed the cotton. Mr. Cassels and Somji Sejjal, one of the plaintiffs, were in the rooms when the award was made, and were informed of the result of the arbitration. Mr. Cassels did not then tell Somji he intended to appeal.

8. If Mr. Cassels had intended to accept the award of the arbitrators according to the usual course of business, his mukádam would at once have stamped the bales and taken delivery of the cotton

subsequently by weighment. Ravji the mukádam says he left the rooms of the Association on other business before the arbitrators had made their award. On his return he found that Mr. Cassels had also left, but was informed by one of his men that the arbitrators had passed the cotton, and that Mr. Cassels had left instructions for the bales to be stamped. Thereupon Ravji went to the press where the bales were lying, saw Somji Sejjpal there, and informed him that he had received Mr. Cassels' instructions to stamp the bales, and did so. It must also be stated that Somji himself when he left the rooms of the Association was under the impression, from what had passed there, that Mr. Cassels had directed the bales to be stamped.

9. On the evening of the 17th April Ravji saw Mr. Cassels at his office and told him he had stamped the bales. His evidence as to what passed at this interview is as follows: "I informed Mr. Cassels that I had stamped the bales. He said he wanted to appeal. Mr. Cassels said he had not said anything about stamping and wished to appeal. I told him I had stamped the bales according to a message given to me as from him by one of my men." Although Mr. Cassels was told the bales had been stamped, neither he nor his mukádam informed the plaintiffs that this had been done by mistake. The first reference to the mistake was made by Peel, Cassels, and Company in their letter of the 25th of April, four days after the award of the committee. In this letter they say: "Regarding the cotton having been stamped by us, if this allegation is true, the cotton was stamped in error by our mukádam's people without the orders or knowledge of Mr. Cassels, who alone at Colába can give orders to stamp cotton."

10. On the 18th April Peel, Cassels, and Company under rule 22 appealed to the committee of the Association against the award of the arbitrators, and on the same day gave the plaintiff's notice of the appeal. The plaintiffs not having been informed of the mistake under which the bales were stamped, and being of opinion, for reasons which will presently be stated, that stamping was evidence of acquiescence in the award of the arbitrators and a waiver of the right of appeal refused to join in the appeal to the committee or to be bound by such appeal. By an award dated the 19th April, signed by four members of the committee, the cotton was pronounced to be "mixed" and "not a fair tender." On the same day the defendants informed the

1885.

DAMJI MEGJI
vs.
A. HARVEY.

1885.

DAMJI MEGJI
vs.
A. HARVEY.

plaintiffs of the results of the appeal to the committee. The plaintiffs, however, refused to be bound by the award of the committee and insisted on delivery of the cotton being taken under the award of the arbitrators. As this was not done, the plaintiffs sold the cotton by auction and now sue to recover the loss occasioned by such re-sale.

11. As to the practice of stamping bales, it was proved by the evidence in the case, that if the award of the arbitrators under rule 17 is against the purchaser and the latter intends to appeal, the bales are not stamped until after the result of the appeal is known. In short, it must be taken as established that, in the absence of any explanation, stamping the bales immediately after the award of the arbitrators is regarded as evidence of acquiescence in the award and a waiver of the right of appeal.

12. On this evidence I held that it was Mr. Cassels' duty, when the mistake came to his knowledge, to have informed the plaintiffs of it before or at the time he appealed. As this was not done I was of opinion that the plaintiffs were justified, having regard to the well established practice in such cases, in presuming that Mr. Cassels had acquiesced in the award of the arbitrators and waived or lost his right of appeal and that the plaintiffs were not bound by the award of the committee. I therefore gave judgment for the plaintiffs for the amount claimed subject to the opinion of the High Court on the following questions :

(1) Whether Mr. Cassels having sent in his application for an appeal within the time prescribed by the rules of the Cotton Trade Association, he can, under the circumstances above set forth, be held to have waived or lost his right of appeal ?

(2) Whether, as the appeal was filed within the proper time allowed by the rules, Mr. Cassels was bound to communicate to plaintiffs that the cotton had been stamped in error, or whether the appeal itself was not a sufficient repudiation of the award ?

Should their Lordships be of opinion that Mr. Cassels had not lost his right of appeal, as the award of the committee on the appeal was in his favour, the judgment entered for the plaintiffs will be set aside and the suit dismissed.

JUDGMENT OF THE HIGH COURT (Sargent, C.J., and Bayley, J.)

1885.

DAMJI MEGJI
vs.
A. HARVEY.

Assuming for the moment that the stamping of the bales by the purchaser would operate as an acceptance of the cotton and therefore as a waiver of his right of appeal, the stamping in the present case must be taken to have been by a mukádam acting without the authority of his principal. But it was said that Mr. Cassels was bound to have given the plaintiffs notice that the stamping had been done without authority as soon as he became aware of it on the evening of the 17th, and that not having done so, he must be taken to have adopted it or at any rate that the plaintiffs were entitled to presume that the stamping had been authorised and that he had waived his right of appeal. But the notice of appeal to the committee on the morning of the 18th gave plaintiffs notice that Mr. Cassels had not or considered that he had not waived his right of appeal, and if the plaintiffs thought that the contrary was the case, as reasonable men they should have asked for an explanation of the bales having been stamped by Mr. Cassels' mukádam and not have assumed everything in support of a waiver and absented themselves from the enquiry before the committee. Mr. Cassels is therefore not stopped, as was contended before us, from pleading the result of the appeal as a defence to the present action. The first question must, therefore, must be answered in the negative, and as to the second our opinion is that notice of the appeal was sufficient to give the right to appeal. Plaintiffs must pay the defendants the costs of this reference. The costs of suit should be paid by the plaintiffs.

Attorneys for plaintiffs—*Thakurdas and Dharamsi.*

Attorney for defendants—*C. A. Winter.*

TUKARAM MAHADJI, PLAINTIFF, versus JANKU, WOMAN,
DEFENDANT.

1886.

Mar. 9.

Hindu Law—Custom among Sudras—Return by widow on re-marriage of ornaments presented to her on her first marriage by her husband or his family—Act XV. of 1856, section 5.

The custom which prevails among that class of Sudras who recognize the marriage contract termed "Pat," that a widow who performs that contract should return to her former husband's family the ornaments which had been given to her by them has not been abrogated by Act XV. of 1856.

1886.

TUKARAM
MAHADJI
vs.
JANKU.

CASE stated for the opinion of the High Court under section 69 of the Presidency Small Cause Courts Act (XV. of 1882).

1. The plaintiff in this suit seeks to recover from the defendant, who was the wife of his deceased son, certain ornaments which he alleges he gave her on the occasion of her marriage with his son, and which he contends she is bound by the custom of the caste to return to him on her re-marriage.

2. The suit was called on for hearing before the Acting Second Judge of this Court, when it was contended on behalf of the defendant that since the passing of Act XV. of 1856 such a claim was not maintainable.

3. The Acting Second Judge concurred in this contention, and without taking any evidence dismissed the suit.

4. The plaintiff thereupon applied to the Full Court, composed of the Acting Chief and Second Judges, for a new trial, and a rule *nisi* was granted.

5. On the argument of the rule reference was made to section 5 of Act XV. of 1856, which says that except as in the three preceding sections is provided, a widow shall not by reason of her re-marriage forfeit any property or any right to which she would otherwise be entitled. It was contended that the ornaments of which it was sought to deprive the defendant do not fall within the description of property mentioned in the three sections referred to, and as section 5 expressly exempts from forfeiture on re-marriage property to which the widow would otherwise be entitled, she could not be deprived of these ornaments.

6. For the purpose of the present reference it must be assumed that the parties to the suit belong to that class of Sudras among whom the marriage contract termed "Pat" is recognized, and that the ornaments claimed are such as according to the custom of the caste (as laid down by Steele in his work on the Law and Custom of Hindu Castes, page 169) the defendant would be bound to return to her former husband's family had Act XV. of 1856 not been passed.

7. After hearing the arguments on the rule the Judges differed in opinion. The Acting Chief Judge, for reasons which are set out in his judgment, was of opinion that Act XV. of 1856 had not modified the custom above referred to. The Acting Second Judge adhered to the opinion which he had expressed at the first hearing.

8. There being a difference of opinion between the Judges on a question of law, the case is, under section 69 of the Presidency Small Cause Courts Act, referred for the decision of the High Court, and their Lordships' decision on the following question is solicited :

Has the custom which prevails among that class of Sudras who recognize the marriage contract termed " Pat," that a widow who performs that contract should return to her former husband's family the ornaments which had been given to her by them, been abrogated by Act XV. of 1856 ?

JUDGMENT OF THE HIGH COURT—(Sargent, C.J., and Bayley, J.).

The question referred to us must be answered in the negative. Section 5 of the Act of 1856, which was passed to remove all legal obstacles to the marriage of Hindu widows is not, we think (whatever its meaning may be), applicable to the case of property given to a Sudra woman of the class in question. On her marriage such property is not forfeited within the contemplation of the above section, but simply reverts to her first husband's family by virtue of a condition attached to the gift itself. It could not, we think, have been the intention of the Legislature, even if the case could be deemed to fall within the language of section 5, to render null and void for the future, a condition expressly attached to a gift on marriage by a Hindu husband or member of his family at the time it is made, that it should revert to that family on re-marriage. Now this is practically the effect of the alleged custom of that class of Sudras amongst whom the re-marriage of widows has always been allowed. The custom tacitly annexes the above condition to all gifts by husbands or members of their families to wives on marriage.

L. W. G. RIVETT CARNAC, ADMINISTRATOR GENERAL OF
BOMBAY, PLAINTIFF, versus JEVIBAI AND OTHERS, DEFENDANTS.

Hindu Law—Widow's estate in immoveable property—Intention to accumulate.

M. N., a Hindu, died on 17th September 1872, leaving his widow F., a nephew G. V., and a daughter-in-law G., him surviving, and leaving immoveable and moveable property. F. became entitled to a widow's estate in the immoveable property, and by agreements with K. allowed K. to recover the rents of such immoveable property subject

B 1873—13

1886.

TUKARAM
MAHADJI
VS.
JANKU.

1886.

Mar. 9.

1886.

RIVETT
CARNAO
vs.
JEVIBÁL.

to the payment to her annually of a sum which varied from year to year. On the 28th August 1883 F. died, and at that date there was a sum of Rs. 1,787-10-3 due to her from K, (as shewn by his books) in respect of the said rents. K. paid over the said sum to G. V. as the right heir of M. N.

Held, in a suit against the defendant as representative of K., that in the absence of any outward sign of an intention on F.'s part to accumulate, the said sum of Rs. 1,787-10-3 formed part of her estate, and passed to the plaintiff as her administrator.

CASE stated for the opinion of the High Court under section 69 of Act XV. of 1882, by W. E. Hart, Chief Judge.

1. The parties are agreed as to the facts set forth in the plaint, copy whereof is as follows :

Murar Naron, the husband of the abovenamed Fulvahu, died at Bombay on or about the 17th of September 1872, intestate, leaving him surviving the said Fulvahu his widow, one Goculdās Valabhdās the son of his predeceased daughter Nanki, and Gomtivahu the widow of his predeceased son Hurjivan, the only persons entitled, according to Hindu law, to any interest in or to his property, moveable and immoveable. The said Gomtivahu was entitled only to maintenance out of the estate of the said intestate.

The said Murar Naron was not at the time of his death possessed of any moveable property whatsoever save only about Rs. 2,400 cash in the hands of Jairam Damji, and household furniture, copper and brass utensils, and porcelain jars &c. of the aggregate value of about Rs. 500.

The said Murar Naron was at the time of his death possessed of certain immoveable properties situate at Ganeshwadi, at Loharchal, and at Picket Road in Bombay.

For some time prior to and up to the time of the death of the said Murar Naron, Kharva Bhana Dhanji, in consideration of making an annual payment, the amount of which was fixed from year to year, was permitted by the said Murar Naron to recover and receive the rents of the said properties at Loharchal and Picquet Road.

Upon the death of the said Murar Naron, his widow, the said Fulvahu, became entitled to a widow's estate in the immoveable properties left by him, and she accordingly entered into possession and management of his estate, and in pursuance of verbal agreements from year to year entered into between the said Fulvahu and the said Kharva Bhana Dhanji, the latter continued, until the 26th day of May 1883, to recover and receive the rents of the said properties at Loharchal and Picquet Road, respectively, in consideration of which he agreed from time to time to pay certain fixed annual sums to the said Fulvahu. The annual sum so payable by the said Kharva Bhana Dhanji to the said Fulvahu was at first fixed at Rs. 2,700, afterwards at Rs. 2,425, and lastly at Rs. 2,200.

The said Kharva Bhana Dhanji used from time to time, on behalf of the

said Fulvahu, to pay the municipal rates, Government and fazendári rents and other outgoings in respect of the said properties, and used to debit the amount of such payments to the said Fulvahu, crediting her on the other hand with the annual sums from to time payable by him as aforesaid. On the 26th May 1883, there was a balance of Rs. 1,787-10-3 due from the defendant to the said Fulvahu in respect of the yearly privilege of recovering the rents as aforesaid.

The said Fulvahu died intestate at Bombay on or about the 28th day of August 1883, and on the 18th day of December 1884, letters of administration of her property and credits were granted to the plaintiff by the High Court of Judicature at Bombay.

The plaintiff as such administrator as aforesaid has through his attorneys demanded payment from the said Kharva Bhana Dhanji the said sum of Rs. 1,787-10-3, but he failed to pay the same or any part thereof.

The plaintiff prays judgment for Rs. 1,787-10-3, and the costs of this suit.

2. At the hearing it was alleged on behalf of the defendants, and not denied, that Kharva Bhana Dhanji, after the death of Fulvahu, had paid the sum of Rs. 1,787-10-3 to Gokaldás Valabhdás the grandson of Fulvahu and her husband by their predeceased daughter Nanki. It was further admitted on behalf of the plaintiff that Gokaldás was the reversioner-expectant on the determination of Fulvahu widow's estate, and on her death had succeeded to all the immoveable property as the right heir of her husband. The only question raised by the defendant's counsel was whether such payment to Gokaldás was not good as against the representatives of Fulvahu, inasmuch as at her death the Rs. 1,787-10-3 formed no portion of her estate, but became payable to the heir to the immoveable property.

3. The authorities cited in argument were Mayne's Hindu Law and Usage, pages 236—539, and the cases there mentioned, and I. L. R. 9 Cal. 758.

4. It was argued on behalf of the defendants that the sum of Rs. 1,787-10-3 was rent due but not paid at the time of the widow's death, and that inasmuch as it had not been paid to her, there had been no such reduction of it by her into her own possession as would sever it from the immoveable property whence it arose, so as to afford any presumption of an intention to create thereout a separate fund of her own.

5. I was of opinion this argument proceeded on a false premise. The rent as such had been paid by the tenants and received by

1886.

RIVETT
CAERNAC
VS.
JEVIBÁK

1886.

RIVETT
CARNAC
vs.
JEVIBÁI.

Kharva Bhana Dhanji as Fulvahu's agent for its recovery on her account before her death. It had, therefore, been completely severed from the immoveable property whence it arose and had been appropriated to Fulvahu's separate account. By far the greater part of the moneys so appropriated had in fact been drawn and expended by Fulvahu, who was only prevented by the accident of her death from drawing and expending the balance of Rs. 1,787-10-3, which formed the subject of this suit. The mere fact that she had not lived to draw and expend this balance would not, in my opinion, suffice to change its character in the hands of her agent for collection, and remit it to the immoveable estate any more than it would in the hands of her bankers, supposing she had drawn it from him and paid it in to them. In short, the case seemed to me not one of such "accumulation or accretion" as Mr. Mayne instances, but rather one of an accidental balance such as those instanced in the case reported at 25 Cal. W. R. 335, which he cites at the end of the passage referred to above in paragraph 3.

6. I, therefore, passed judgment for the plaintiff for the sum of Rs. 1,787-10-3 and costs, and certified Rs. 51 professional costs against the assets of Kharva Bhana Dhanji in the hands of the defendants. But at the request of the defendants' counsel, and on condition of the defendants giving satisfactory security for the payment of the amount of the judgment, and Rs. 50 costs of the reference (which they have done by the deposit of Government promissory notes), such judgment was made contingent on the opinion of the High Court on the question whether the balance of Rs. 1,787-10-3 shown in the books of Kharva Bhana Dhanji to the credit of Fulvahu at her death formed a portion of her estate. If that question be answered in the affirmative the present judgment will stand. If in the negative, the judgment for the plaintiff will be set aside, and the suit will be dismissed with Rs. 51 professional costs to be paid by the plaintiff out of the estate of Fulvahu.

JUDGMENT OF THE HIGH COURT (Sargent, C.J., and Farran, J.)

It is clear upon the authorities that the savings or accumulations, as they are sometimes termed, by a widow out of the income of her husband's estate pass to her heirs on her death.

In *Isri Dutt Koer vs. Hansbutti Koerain*,⁽¹⁾ the Privy Council treat this as well established law. They say, "If the widow has made no attempt to dispose of the savings from her husband's estate there is no dispute that they follow the estate from which they arise." This, however, leaves the question open as to what constitutes saving or accumulations. Is all unexpended income at the death of the widow "savings" within the rule? In *Ohundra-bulee Debia vs. Brody*,⁽²⁾ the Court, consisting of Glover and Kemp, JJ., would appear, upon a more restricted view of the widow's estate than now obtains, to have considered it to be so.

However, in *Hunsbuttee vs. Ishri Dutt*,⁽³⁾ Ainslie, J., says that "the fact that unappropriated profits do not pass as *stridhan* is to be explained on the theory that when the widow has left money accumulated it was her intention to add such money to the estate, and to abstain from exercising her full rights over them."

This view seems to us to be more reconcileable with the accepted theory as to the widow's estate at the present day, which allows of her not only enjoying the usufruct, but alienating her interest by anticipation, and leaves the question, whether unexpended income at the time of the widow's death is to be regarded as an accretion to the husband's estate, to depend upon whether it can be treated as an accumulation.

In the present case the cash-balance in question does not amount to much more than half the yearly payment by Kharva Bhana Dhanji, and had not been separated from the general account so as to form a distinct fund.

There is an entire absence of any outward sign of an intention to accumulate; whilst, on the contrary, the existence of debts rebuts any such intention, and points to the conclusion that the balance was held in suspense by the widow at the time of her death, to use the language of the Privy Council in *Isri Dutt vs. Mussumut*.

We think, therefore, that the question referred to us must be answered in the affirmative.

1886.
RIVERT
CAENAO
vs.
JEVIBAI.

(1) L. R. 10 I. A. 150.

(2) 9 W. R. 584.

(3) I. L. R. 5 C. 512.

1886.
Sept. 4.

BALAJI VISHVANATH, PLAINTIFF, versus VISHVANATH
VITHOBA PATNI, DEFENDANT.

Dekkhan Agriculturists' Relief Acts, 1879 to 1882—Act XVII. of 1879, sec. 3 cl. (w)—Subject-matter of suit—Definition of “an Agriculturist.”

The plaintiff claimed to recover from the defendant a sum of Rs. 550 (the receipt of which was acknowledged by the defendant's signature to an entry in the plaintiff's book) together with Rs. 41 for interest, as the amount of earnest-money paid by the plaintiff to the defendant at Sângola on an agreement for the purchase of piece-goods of the value of Rs. 1,455, to be delivered at Bombay, which the defendant afterwards failed to deliver. The defendant resided at Sângola, in the Sholâpur district, where he kept a shop for the sale of piece-goods, from which he derived a net annual income of about Rs. 700. He was also in possession of some 37 acres of land in the same district, from the produce and rents of which he derived an annual income of about Rs. 2,000.

Held, that the suit fell within the descriptions given in sec. 3 cl. (w) of Act XVII. of 1879, and that the defendant was an ‘agriculturist’ as defined in the Dekkhan Agriculturists' Relief Act, 1879 to 1882.

CASE stated for the opinion of the High Court by W. E. Hart, Chief Judge.

1. The facts of this case material to the reference are set forth in the following judgment delivered by me on 5th October 1885. The plaintiff has complied with the conditions proposed at the conclusion of the judgment. I therefore beg to refer for the opinion of their Lordships the Judges of the High Court of Bombay, the two following questions :

(1) Does this suit fall within any of the descriptions given in section 3 cl. (w) of Act XVII. of 1879 ?

(2) Is the defendant an agriculturist as defined in the Dekkhan Agriculturists' Relief Acts, 1879 to 1882 ?

2. If the answer to both questions be in the affirmative, my order of dismissal will stand ; but if either question be answered in the negative, that order will be set aside, and I shall proceed with the hearing of the case.

3. The plaintiff in this suit claims to recover from the defendant the sum of Rs. 550 (the receipt of which is acknowledged by defendant's signature to an entry in plaintiff's book), together with Rs. 41 added thereto for interest, as the amount of the earnest-money paid by the plaintiff to the defendant at Sângola on an agreement for the purchase of piece-goods of the value of Rs. 1,455, to be delivered at Bombay, which the defendant afterwards failed to deliver, and also

the sum of Rs. 10-5 as the costs of certain notices of demand sent to the defendant before action.

Besides various other defences on the merits the defendant raises the plea of jurisdiction under the Dekkhan Agriculturists' Relief Acts, 1879 to 1882. It is with this plea only that we are now concerned, and under it arise two questions: (1) Is this suit one of those to which these Acts apply? (2) Does the defendant belong to the class of persons entitled to rely on their provisions?

For an answer to the first of these questions we must turn to section 3 clause (w), and section 11 of the first of this series of Acts, No. XVII. of 1879. In so far as regards the litigated amount and the class of Courts to which they relate, these sections have already received a judicial interpretation at the hands of West, J., in the case of *Tulsidas vs. Virbasapa*⁽¹⁾. Though apparently not without doubts whether they did not express more than the Legislature wished, he held that its intention as expressed was that these sections should apply to all the Courts in British India, and to suits for any amount. It therefore only remains, in regard to the nature of this suit, to determine whether it falls within any of the descriptions given in clause (w) of section 3 of Act XVII. of 1879. As to this, though the defendant's attorney suggested it *might* not, the plaintiff's pleader did not contend that it *did* not. I think the suit would be correctly described as one on account of money advanced to the defendant, the sum described in the summons as earnest-money having evidently been intended for a part payment of the purchase-money in advance, and the words of the section apparently regarding money so advanced as distinct from money lent. I think the claim might also correctly be regarded as one on an account stated between the plaintiff and defendant, not only in the particulars annexed to the summons, but also in the signed entry and notices of claim before action. I must therefore find the first issue in the affirmative, and hold that this suit is one of those to which the provisions of the Dekkhan Agriculturists' Relief Acts, 1879 to 1882, apply.

Turning now to the second question, we find that the answer depends upon whether or not the defendant is an agriculturist within the meaning of the definitions contained in Act XVII. of 1879 and its amending Acts XXIII. of 1881 and XXII. of 1882. Section 2,

1886.

BALAJI
VISHVANATH
VS.
VISHVANATH
VITHOBA
PATIL.

(1) I. L. R. 4 Bom. 624.

1886.

BALAJI
VISHVANATH
vs.
VISHVANATH
VITHOBA
PATNI.

clause 2, of the first Act defines an agriculturist to be "a person who earns his livelihood wholly or principally by agriculture carried on within the limits of the said districts" (Poona, Sátára, Sholápur, and Ahmednagar), and enacts that he "shall be deemed to 'reside' where he so earns his livelihood."

For this was substituted the expanded definition in section 4 of Act XXIII. of 1881 :

"Agriculturist means a person who when, or after incurring any liability, the subject of any proceeding under this Act, by himself, his servants, or tenants, earned or earns his livelihood, wholly or partially, by agriculture carried on within the limits of the said districts.

"A cultivator who has temporarily ceased to earn his livelihood in manner aforesaid without any intention of changing his *status* as such does not thereby cease to be an agriculturist within this definition.

"An assignee of Government assessment, or a mortgagee, is not, as such, an agriculturist within this definition.

"An agriculturist shall be deemed to 'reside' where he earns his livelihood in manner aforesaid."

This further definition being apparently still found insufficient, section 3 of Act XXII. of 1882 substituted for section 2 of the former Acts four rules of construction, the first three of which with their explanations thus refer to the term agriculturist :

"(First) Agriculturist shall be taken to mean a person who by himself, his servants, or tenants, earns his livelihood, wholly or principally, by agriculture carried on within the limits of the said districts, or who ordinarily engages personally in agricultural labour within those limits. Explanations :—(a), an agriculturist who without any intention of changing his status as such, temporarily ceases to earn his livelihood or to engage personally in agricultural labour as aforesaid, does not thereby cease to be an agriculturist within this definition ; (b) an assignee of Government assessment, or a mortgagee, is not, as such, an agriculturist within this definition. (Second) In Chapters 2, 3, 4, and 6, and in section 69, the term 'agriculturist,' when used with reference to any suit or proceeding, shall be deemed to include also a person who, when any liability incurred by him, and forming the subject, or part of the subject, of that suit or proceeding was so incurred, was an agriculturist as defined in the first rule. (Third) An agriculturist shall be deemed to reside where he earns his livelihood or personally engages in agricultural labour as aforesaid."

In the present suit then, if the defendant be shown to earn his livelihood principally by agriculture carried on by himself, his servants, or tenants within the limits of any of the four districts above named, he must be held to be an agriculturist residing at the place where

the said agriculture is so carried on, and therefore under section 11 of Act XVII. of 1879 to be amenable to the jurisdiction only of the local Court of that place.

It appears on the evidence that the defendant resides at Sângola, in the district of Sholápur, where he keeps a shop for the sale of piece-goods, from which he derives a net annual income of about Rs. 700, a sum amply sufficient for the livelihood of a person in his position. It also appears that he is in the possession of some thirty-seven acres of land in the same district, from the produce and rents of which he derives an income of about Rs. 2,000 per annum, or nearly three times as much as the income he derives from his shop.

It does not appear how long he has conducted the shop, but as he has held none of the land more than sixteen years, and some for not more than eight, and is apparently well over forty years old, it would seem, and for the purposes of this case I should hold as a fact, that he was originally a shopkeeper, and from the profits so earned has developed into a landholder also, and now derives a larger income from his land than from his shop.

It is to be noticed that the definitions of an agriculturist above mentioned turn, not upon the source of income, but the source of livelihood, and finding that the defendant still earns from the shop, which he kept before he held any land, enough for his whole livelihood, it seems to me very doubtful whether he ought to be said to earn his livelihood principally from agriculture.

Having regard to the history of the legislation above noticed, to the preamble of Act XVII. of 1879, and to the explanations of the first rule contained in section 3 of Act XXII. of 1882, it seems to me improbable that the object of that legislation was to benefit money-lenders or shopkeepers, who out of the profits of their commercial dealings are enabled to undertake agriculture, while they continue to derive from commerce an income sufficient for their livelihood.

At the same time I find it impossible to ear-mark any particular portion of the expenditure on livelihood defrayed from the mixed income so as to be able to say, "So much of his livelihood is derived from the shop and so much from the fields." It seems to me the defendant might not unreasonably contend, "My livelihood is derived impartially from my entire income, one-fourth of which is derived from my shop and three-fourths from fields; therefore of every rupee

1886.

BALAJI
VISHVANATH
vs.
VISHVANATH
VITHOBA
PATNI.

1886.

BALAJI
VISHVANATH
VS.
VISHVANATH
VITHOBA
PATNI.

spent on my livelihood twelve annas must be held to be derived from the fields, and consequently I earn my livelihood principally by agriculture." Nor can I properly speculate on the intentions of the Legislature except as I find them expressed in its enactments.

In the case decided by West, J., to which I have referred, it appears that the defendants were sued as traders, but as one of them gained his livelihood principally by agriculture, the suit was dismissed. It does not appear whether this one, independently of agriculture, derived from his share in the trading partnership an income sufficient for his livelihood, nor does it appear from the report of that case whether this point was suggested. But so far as that case goes it is an authority binding on me to hold that an admitted trader may also be an agriculturist within the meaning of the Dekkhan Agriculturists' Relief Acts.

On this authority, and for the reasons above given, I must hold in the present case that the defendant is such an agriculturist, and consequently that I have no jurisdiction to entertain this suit. But this is a conclusion I arrive at reluctantly, not without doubt, and if the plaintiff so wishes, and will within a week deposit in this Court the amount of costs now awarded against him, and a sum of Rs. 50 for the costs of the reference, I will refer the questions considered in this judgment for the opinion of the High Court. Meantime, and subject to such opinion, the suit is dismissed with professional costs Rs. 51 certified to be paid by the plaintiff to the defendant.

JUDGMENT OF THE HIGH COURT—(Sargent, C.J., and Farran, J.)

From the case stated for our opinion and from the explanatory letter of the Chief Judge of the 14th July last it appears that the defendant's income is made up thus :

From cultivation carried on by his servants at Lowáibar (per annum) Rs. 1,500.

From rent of his lands at Jerbai paid in cash or in kind (per annum) Rs. 500
to Rs. 600.

From his piece-goods shop Rs. 700.

We think that these figures show that the defendant is an agriculturist within the definition of that term contained in Act XXII. of 1882 as a person who gains his livelihood principally from agriculture. It may be that a trader, who invests his profits in

lands, which he cultivates while still carrying on his trade, is not one of the class which the exceptional legislation enacted for the Dekkhan districts was designed to protect, but we cannot speculate on the supposed intention of the Legislature, and have only to consider whether the person claiming exemption from the ordinary procedure of the Court falls within the terms of the definition which the Legislature has adopted.

We also agree with the Chief Judge in thinking that the subject-matter of this suit brings it within the description of suits described in section 3, clauses (w) and (x), of Act XVII of 1879.

We agree, therefore, with the Chief Judge in both his conclusions, and answer the questions submitted to us in the affirmative.

TULSA GULAL AND OTHERS, PLAINTIFFS, versus JOHN ANTONE
AND ANOTHER, DEFENDANT.*

THE BOMBAY TRAMWAY COMPANY, LIMITED, APPLICANT.

Execution—Practice—Garnishee—Attachment by a judgment-creditor of a debt due to judgment-debtor by a third party—Order upon third party to pay, where debt admitted—Procedure where existence of debt not admitted—Civil Procedure Code (Act XIV. of 1882), sections 267, 268, 503.

When a debt alleged to be due by a third party to a judgment-debtor has been attached by the judgment-creditor, the Court may, under section 268 of the Civil Procedure Code (Act XIV. of 1882), make an order upon the garnishee for the payment of such debt to the judgment-creditor, in case the former admits it to be due, for so much as he admits to be due to the judgment-debtor. Where, however, the garnishee denies the debt, there is no other course open to the judgment-creditor than to have it sold, or to have a receiver appointed under section 503 of the Civil Procedure Code (Act XIV. of 1882).

CASE stated for the opinion of the High Court under section 617 of the Code Civil Procedure (XIV. of 1882) by Mr. N. Spencer, Acting Chief Judge.

1. The plaintiffs abovenamed recovered judgment in this Court against the defendants for the sum of Rs. 51-14-0, payable by monthly instalments of Rs. 2.

2. Default was made in payment of the instalments, and on the 9th of December 1886 there was a balance due to the plaintiffs under their decree of Rs. 20-2-0.

* Reported at I. L. R. 11 Bom. 448.

1886;

BALAJI
VISHVANATH
vs.
VISHVANATH
VITHOBA
PATNI.

1887.

April 4.

1887.

TULSA GULAL

VS.

JOHN ANTONE.

3. The first defendant is employed in the Bombay Tramway Company, and on the 9th of December the plaintiffs obtained an order under section 268 of the Code of Civil Procedure (Act XIV. of 1882) prohibiting the Tramway Company until the further order of this Court from paying to any person whomsoever the above sum out of the salary due to the defendant for the month of November 1886.

4. On the 7th of January 1887 the plaintiffs obtained a Judge's summons requiring the Manager of the Tramway Company to appear before this Court on the 19th of January, to show cause, if any, why he should not pay to the plaintiffs the moneys in his hands.

5. Mr. Roughton appeared for the Tramway Company in obedience to this summons. He admitted that the company had the money in their hands, but he contended that no provision was made in the Code of Civil Procedure for issuing such a summons after the prohibitory order, and that the summons itself, and the order, which it has been the practice of this Court to make on the summons, when no cause is shown, were *ultra vires*. He further contended, that, if the money was not paid into Court after service of the prohibitory order, the Court could only adopt one of two courses, either appoint a Receiver to collect the debt or direct that this debt be sold by auction.

6. Since the passing of Act XV. of 1882 making the Civil Procedure Code applicable to this Court, it has been the practice, when a debt has to be attached, to issue a prohibitory order under section 268, and, if the debt is not paid into Court under clause (c), to issue a summons according to the form Appendix B.; and, if no cause is shown, to make an order that the debtor shall pay the decree-holder the amount in his hands, or so much thereof as shall be sufficient to satisfy the amount due by the defendant.

7. The prohibitory order A. is taken from Form No. 140 in the schedule of forms attached to the Code. The other forms B. and C. were, I believe, adopted from forms obtained from the office of the Prothonotary of the High Court after the passing of Act XV. of 1882.

8. The English Supreme Court of Judicature Act, 1875, Order XLV., clause 2, provides for the attachment of debts by an order of the Court, and directs that 'by the same or any subsequent order

it may be ordered that the garnishee shall appear before the Court or a Judge or an officer of the Court, as such Judge or Court shall appoint, to show cause why he should not pay the judgment-creditor the debt due from him to the judgment-debtor or so much thereof as may be sufficient to satisfy the judgment-debt.' There is no similar provision in the Civil Procedure Code, but section 268 of the Code and the form of prohibitory order (order A), do contemplate the passing of a further order, and it appears to me that the Court cannot make this further order without having the parties before it. Again, section 267 empowers the Court to summon and examine persons as to property liable to be seized in satisfaction of decrees, and the issue of the Judge's summons, and the inquiry on the summons, may be considered as authorized under this section. No form of summons under this section is given in the Code, nor does the section say that the enquiry contemplated shall be made before the issue of the prohibitory order under the next following section. What may be the effect of the order which it has been hitherto the practice to make on the Judge's summons when no cause is shown, is a distinct question which does not now arise. The contention of Mr. Roughton is that the Court has no power to issue the summons B. or to make the order C.

On Mr. Roughton's application I submit the question he has raised for the opinion of the High Court. The prohibitory order, which is above referred to as order A, was in the following terms :

"TO THE MANAGER, BOMBAY TRAMWAY COMPANY, LIMITED.

Whereas John Antone, a carpenter in the Bombay Tramway Company, Limited, has failed to satisfy a decree passed against him and one Bhima Ramji on the 9th day of December 1884 in favour of the plaintiffs abovenamed for Rs. 51-14, and whereas Rs. 19-14, the balance of the said decree, and the costs of this order, Rs. 4, now remain unpaid ; it is ordered that the first defendant be, and is hereby prohibited and restrained until the further order of this Court from receiving from you a certain debt alleged now to be due from you to the said first defendant, namely the sum of Rs. 20-2 out of his salary of Rs. 30 for the month of November 1886 ; and that you, the said Manager, Bombay Tramway Company, Limited, be, and you are hereby prohibited and restrained until the further order of this Court from making payment of the said debt or any part thereof to any person whomsoever."

The following is the summons above alluded to as summons B. :

"Upon reading the prohibitory order issued herein, and dated the 9th

1887.

TULSA GULAL
vs.
JOHN ANTONE.

1887.
 TULSA GULAL
 vs.
 JOHN ANTONE.

day of December 1836, and the return of the bailiff of service thereof, and on hearing the plaintiffs, I do order that the Manager, Bomlay Tramway Company, Limited, do appear before me at this Court on the 19th day of January 1887, at eleven o'clock in the forenoon, to show cause, if any he has, why he should not pay to the plaintiffs the moneys in his hands belonging to the first defendant or so much thereof as shall be sufficient to satisfy the amount due by the defendants to the plaintiffs under the decree herein.

I further direct that a copy of this summons shall be served on the first defendant abovenamed."

The following is the order C. :

"Upon reading the Judge's summons issued herein dated &c. and on proof of service thereof, and on hearing the plaintiff &c., I do order that the said &c. do out of the moneys in his hands pay to the plaintiff the sum of Rupees &c., in respect of the decree herein."

Inverarity for the Tramway Company.

JUDGMENT OF THE HIGH COURT—(Sargent, C.J., and Bayley, J.)

The question we have to determine is whether the Small Cause Court has power to issue the summons B. or to make the order C. annexed to the reference. This depends upon the language of certain sections of the 19th chapter of the Civil Procedure Code (Act XIV. of 1882) which, by section 23 of Act XV. of 1882, are made applicable to the Small Cause Court.

Section 267 of the Civil Procedure Code (Act XIV. of 1882), which is substantially the same as sections 219 of Act VIII. of 1859 and 267 of the Code of 1877, gives power to the Court to "summon any person" it thinks necessary and "examine him in respect of any property liable to be seized in satisfaction of the decree." Sections 268 and 269 show that "seizure" does not necessarily mean *actual* seizure and may include such constructive seizure as is provided by the former of those sections. Nor is there anything in section 266, which is clearly in aid of execution, requiring that the summons should necessarily issue before attachment has been effected.

But it was said that in any case the summons should not be in Form B., as it assumes that under certain circumstances an order might be made on the garnishee to pay the judgment-creditor, and there was no section corresponding to Rule 3 Order XLV. of the English Judicature Act, which enables this to be done. But although there is no section expressly providing for it, clause (a) of

section 268 implies that the Court may make an order for payment of the debt which the garnishee is to obey, and by the long-established practice of this Court, ever since Act VIII. of 1859 came into force, this has been held to justify an order for payment to the judgment-creditor when the garnishee admits the debt to some amount, or does not deny the debt *in toto*. As the sections of the Code are,—to use the language of Chief Baron Pollock in *Pochin vs. Duncombe*⁽¹⁾—susceptible of this interpretation which has been put upon them by long usage, the Court will not disturb the construction.

We think, therefore, that an order for payment may be made on a garnishee under the above circumstances. If, however, the garnishee denies the debt, there is no other course open to the judgment-creditor than to have it sold, or to have a Receiver appointed under section 503. Subject to these remarks we see no objection either to the summons B. or the order C.

Attorneys for the Bombay Tramway Company—*Tobin and Roughton*.

AHMEDBHAI KIKABHAI AND ANOTHER, PLAINTIFFS, versus
BHANJI DAMJI, DEFENDANT.

Leasehold property—Covenant of title on part of lessor—Liability to purchaser to make good a claim of a prior incumbrancer.

V. N. as lessee of leasehold land in January 1881 assigned the residue of the term to the defendant. In August 1881 the defendant assigned over to the plaintiffs. The conveyance contained a covenant on the part of the defendant “that notwithstanding anything by him done omitted or knowingly suffered to the contrary . . . he now hath good right full power and absolute authority to assign . . . for the term aforesaid free from all incumbrances.” In 1886 D. E. sued V. N. and the plaintiffs in the High Court, claiming to be mortgagee of the said land. V. N. paid the amount of the claim under the mortgage into Court and a decree was passed against the plaintiffs for D. E.’s costs, which the plaintiffs were compelled to pay. In a suit by the plaintiffs to recover from the defendant the amount of such costs and of their own costs of the High Court suit ;

Held, that the defendant was not liable under his covenant to make good such costs to the plaintiffs.

CASE stated for the opinion of the High Court under section 69 of the Presidency Small Cause Courts Act by N. Spencer, Acting Chief Judge.

(1) H. & N. 842 at page 856-7.

1887.

TULSA GULAL
vs.
JOHN ANTONE.

1887.

Aug. 5.

1887.

AHMEDBHAI
KIRABHAI
vs.
BHANJI DAMJI.

1. The plaintiffs in this case seek to recover from the defendant the sum of Rs. 833 as damages for the breach of a covenant contained in a conveyance executed by him on the 8th of August 1881 to indemnify the plaintiffs against all incumbrances on property purchased by the plaintiffs from the defendant and described in the said conveyance.

2. The following are the facts of the case.

3. One Venku Nursu was the owner of a plot of leasehold land at Kamátipura. By an indenture dated 15th January 1881 he assigned the residue of the term of the lease, with the buildings standing on the land, to the defendant.

4. By a subsequent conveyance, dated 8th of August 1881, the defendant conveyed the land and buildings to the plaintiff.

5. Before this conveyance was executed advertisements were published in the newspapers and *bataki* was beaten calling on persons who had claims to the property to make them known. As no claim was made, the conveyance was completed, and the plaintiffs put in possession of the property, and they have since then been in undisturbed possession of the rents and profits.

6. In the year 1886 one Dattubhai Ebraim instituted a suit in the High Court of Bombay (No. 281 of 1886) against Venku Narsu and the plaintiffs, claiming to be mortgagee of the property under an indenture dated 7th of August 1871, and he prayed that he might be put in possession of the premises, or that they might be sold and the proceeds applied in payment of his mortgage claim.

7. The plaintiffs gave the defendant notice of the institution of this suit, and asked him whether he would defend it. The defendant refused to do so.

8. Venku Narsu subsequently paid into Court the amount of Dattubhai Ebraim's claim under the alleged mortgage, namely Rs. 596-15-9, which was paid to Dattubhai Ebraim by order of the Court, and when the case was called on for hearing, the High Court decreed that the defendants in that suit should pay Dattubhai Ebraim his costs. It is for the recovery of the costs paid by the plaintiffs under this decree, Rs. 574-2, and their own costs Rs. 258-14, making together Rs. 833, that the present suit is instituted.

9. The covenant in the conveyance of the 8th August 1881, on which the plaintiffs rely, omitting superfluous words, runs as

follows: "And the vendor doth for himself his heirs executors and administrators covenant with the said purchasers their heirs executors or assigns that notwithstanding anything by the said vendor done omitted or knowingly suffered to the contrary, he the said vendor now hath good right full power and absolute authority to assign all the said premises to the said purchasers their heirs executors administrators and assigns for the term aforesaid free from all incumbrances."

10. Mr. Hemming, who appeared for the plaintiffs, contended that under this covenant the plaintiffs were entitled to recover from the defendants the costs they had paid. He further contended that independently of this covenant there was an unqualified implied warranty of title by the use of the word "grant" in a former part of the same conveyance.

11. I held that the covenant in the conveyance was a restricted one, limited to the acts of the grantor, and was not a general warranty against all mankind. I further held that the word "grant" did not imply an unqualified warranty of title, but, assuming that it did, the insertion of the express covenant against the defendant's incumbrances only, would restrain the implied warranty within the import and effect of the covenant. I therefore dismissed the suit.

12. On the application of Mr. Hemming my judgment has been given contingent on the opinion of the High Court on the following question:—Is the defendant liable under his covenant in the conveyance of the 8th August 1881 to pay to the plaintiffs the costs paid by them in connection with the High Court suit No. 281 of 1886 and referred to in para. 8 of this case?

ORDER OF THE HIGH COURT (Sargent, C.J., and Farran, J.)

The question must be answered in the negative.

1887.

AHMEDBHAI
KIKABHAI
vs.
BHANJI
DAMJI.

1887.

Aug. 15.

MOTIVAHU AND ANOTHER, PLAINTIFFS, versus VINAYAK
VIRCHAND, DEFENDANT.

Vendor and purchaser—Auction sale by mortgagee of mortgaged property—Conditions of sale—Condition that purchaser shall take such title as vendor can give where vendor has no title at all—Construction—Such condition implies possession of some title in vendor.

R. having stolen from N. the title-deeds relating to a certain property in Bombay, in which he had no interest, but which belonged to N., deposited them with the plaintiffs, to whom he also executed an indenture of mortgage of the property comprised in the deeds to secure the repayment of a loan advanced to him by the plaintiffs. The plaintiffs subsequently sold the property at an auction sale under the power of sale contained in the mortgage. The property was put up to auction under certain conditions of sale, of which the following was one: "The vendors shall not be bound to give any better title to the purchaser than they themselves possess; and the purchaser shall take the premises sold with such title only as the vendors can give him." Before the sale commenced a notice on behalf of N. was read out to the persons then present, which stated that she claimed the property as absolute owner and that R. (who had mortgaged it to the vendors) had no interest in it. The defendant was not present when the notice was read. He did not arrive at the auction until after the bidding had begun, but on his arrival he was told of N.'s claim. He was told nothing to make the above condition of sale misleading. He bid for the property, and ultimately became the purchaser for Rs. 1,075. He immediately paid Rs. 270 by way of deposit, and signed an agreement to complete, which had the conditions of sale annexed to it. He subsequently ascertained that R. had no interest in the property, and thereupon he called upon the plaintiffs (the mortgagees) to make out a good title, or to repay his deposit. The plaintiffs, however, relying on the above condition of sale, required him to complete his purchase, and he having failed to do so, they filed this suit against him to recover the balance of the purchase-money.

Held, that the defendant was not liable to pay to the plaintiffs the balance of the purchase-money. The suit, although in form a suit to recover the residue of the purchase-money, was virtually one to compel specific performance and was governed by the principles applicable to such a suit. The purchaser was entitled to say that the above condition of sale implied that the vendors had some title, however defective it might be, and he had received at the auction no information which could be regarded as giving him notice to the contrary.

CASE stated under section 69 of the Presidency Small Cause Courts Act (XV. of 1882) by the Full Bench of the Court of Small Causes.

The plaintiffs as mortgagees of a certain immoveable property in Bombay sold the mortgaged property by auction to the defendant for Rs. 1,075 on the 18th January 1886. The defendant paid Rs. 270 as deposit at the time of purchase. The present suit was

*Reported at I. L. R., 12 Bom. 1.

brought by the plaintiffs to recover from the defendant the balance (namely Rs. 805) of the purchase-money with interest. The defendant refused to complete the purchase unless the plaintiffs could give him a good title to the property, and required them in the event of their being unable to do so, to refund the deposit which he had paid.

The following were the facts of the case :

In April 1848 one Vanarsibái (wife of Damodar Jagannath) purchased the land in question for the sum of Rs. 800, which was her own separate property. At that time no deed of conveyance was executed. Subsequently, by a bond dated the 30th July 1851, she mortgaged the land for Rs. 451 to one Gopikabái, who was the mother of her (Vanarsibái's) daughter-in-law Nathibái, and on the same day she assigned her equity of redemption to Nathibái.

On the 31st December 1851, Vanarsibái obtained a formal deed of conveyance executed to herself by her vendor.

On the 27th August 1860 Nathibái, who, as above stated, had the equity of redemption vested in her, and who was then in occupation of the land, obtained from Gopikabái (the mortgagee) an assignment of her mortgage, and thus became absolute owner of the property.

In 1861 or 1862 Damodar Jagannath (the husband of Vanarsibái) adopted a son named Ramchandra, who, during the lives of Damodar and Vanarsibái, and after their death, resided with Nathibái in the house situated upon the property in question. Damodar died in 1868 and Vanarsibái in 1874.

In 1878 Ramchandra became insolvent and obtained his discharge under section 47 of the Indian Insolvent Act (Stat. 11 and 12 Vic. c. 21). In 1883, during the illness of Nathibái, he (Ramchandra) stole out of her box the title-deeds relating to the said property, and, after depositing them with the plaintiffs, executed in their favour a deed of legal mortgage with power of sale, dated the 8th June 1883, to secure the repayment of Rs. 1,000 lent to him by the plaintiffs, and on the 21st January 1885 he executed to them a deed of further charge for Rs. 500.

In 1885 he became insolvent a second time and again obtained his discharge under section 47 of the Insolvent Act. In his schedule he did not enter the plaintiffs as mortgagees of the property.

The plaintiffs in execution of the power of sale contained in their

1887.

MOTIVAHU
vs.
VINAYAK
VIRCHAND.

1887.

MOTIVABU

VS.

VINAYAK
VIRCHAND.

mortgage put up the property to auction, subject to certain conditions of sale, the ninth condition being in the following words :

“The vendors shall not be bound to give any better title to the purchaser than they themselves possess, and the purchaser shall take the premises sold with such title only as the vendors can give him.”

The sale took place on the 18th January 1886. Before it commenced a notice on behalf of Nathibái was read out to the persons then present, which stated that she claimed the property as absolute owner, and that Ramchandra, who had mortgaged it to the plaintiffs (the vendors), had no interest in it of any kind. The defendant was not present when the notice was read. He did not arrive at the auction until after the bidding had begun, but on his arrival he was told of Nathibai's claim. He, notwithstanding, bid for the property, and ultimately became the purchaser for Rs. 1,075. He immediately paid Rs. 270 by way of deposit and signed an agreement to complete, which had the conditions of sale annexed to it. He subsequently ascertained that Ramchandra had no interest in the property, and thereupon, by a notice dated the 13th February 1886, called upon the plaintiffs to make out a good title or to repay him his deposit.

On the 5th March 1886 the plaintiffs replied, and, relying on the ninth condition of sale, required him to complete the purchase within eight days. The defendant having failed to do so, the plaintiff filed this suit on the 5th January 1886 in the Small Cause Court to recover the balance of the purchase-money.

The suit was heard on 29th July 1886 by the Chief Judge (Mr. Hart), who delivered the following judgment :

This is an action by the vendor of a house against the purchaser to recover the balance of the purchase-money. The facts are peculiar and give rise to a question of law of some nicety. There is no real contest as to them. As admitted, not disputed or proved, they are as follows :

The land on which the house now stands was purchased in 1848 by Rávji (*alias* Balkrishna) Bhasker from Moroba Narayansett with possession, but no conveyance was executed until the 25th April 1848. The deed executed on that date expresses the consideration to be the payment of Rs. 600 to Moroba by Rávji, and contains covenants for title and further assurance. It was registered in the Collector's office on the 19th May 1848. In the meantime, on the 1st April 1848 the purchaser Balkrishna had re-sold the land to Vanarsibái, the wife of Damodar Jagannath, for Rs. 800 with possession, but no conveyance was executed till the

31st December 1851. This deed contains covenants for title, quiet possession, and further assurance, and was registered in the Collector's office on the 20th March 1852.

Of the consideration-money (Rs. 800) to be paid by Vanarsibái to Rávji, Rs. 401 had been allowed to remain on mortgage of the land and house (which is now mentioned for the first time), for the repayment of which Vanarsibái bound herself by a bond of even date with the sale to herself (1st April 1848), in the penal sum of Rs. 802 conditioned for avoidance on payment of Rs. 401 with interest at $\frac{3}{4}$ per cent. per mensem.

This bond, which is unregistered, after reciting the loan of Rs. 401, the agreement to repay it within four years, and the mortgage as collateral security, contains a power to Rávji of entry and sale, in case of default, on payment to him of the sum due within the stipulated time of four years. An endorsement, dated 30th July 1851, shows that Rs. 300 were paid on account on that date, and an enfacement, dated 10th May 1852, shows that the bond was paid in full on that day, and the execution and attestations (one of the latter being that of Vanarsibái's husband, Damodar) are cancelled by erasure.

From two letters of the 28th July 1851, passing between Damodar Jagannath and one Harischandra Ranchodji, it appears that the premises were admittedly the separate property of Vanarsibái, and that she was desirous at this date of raising by the mortgage of them the money necessary to pay off the mortgage to Rávji. Accordingly we find on the 30th July 1851 a bond executed by Vanarsibái, and attested by Damodar (among others) in the penal sum of Rs. 902, conditioned for avoidance on payment by Vanarsibái to Gopikabái, the wife of Harischandra Ranchodji, of Rs. 451 with interest at $\frac{3}{4}$ per cent. per mensem within ten years.

This bond, which is unregistered, after reciting the loan and agreement for repayment with interest, contains an assignment of the premises by way of mortgage by Vanarsibái to Gopikabái, together with deposit of title-deeds, building-certificate, and bills of ground-rent and assessment, and a covenant against otherwise encumbering the property. Under date 27th July 1852 is an endorsement of payment of Rs. 50 on account.

On the same 30th July 1851 Vanarsibái by an unregistered Maráthi deed assigned her equity of redemption to Gopikabái's daughter Nathibái, the widow of Harischandra, a predeceased son of Damodar and Vanarsibái. The consideration for this assignment was said to be the contribution by Nathibái of a portion of the Rs. 451 (the consideration-money for the mortgage to Gopikabái) out of the proceeds of her personal ornaments.

On the 26th July 1852 Gopikabái by another unregistered Maráthi writing released to Vanarsibái all her claims in respect of interest (both past and future) on the abovementioned loan of Rs. 451. In this deed are cited the mortgage of the premises by Vanarsibái to Gopikabái for Rs. 451, for the purpose of payment to Balkrishna Bhasker, the deposit of the deeds by Vanarsibái with Gopikabái, and the agreement that for the future no interest should be charged

1887.

MOTIVAHU
ES.
VINAYAK
VIRCHAND.

1887.

MOTIVAHU
vs.
VINAYAK
VIRCHAND.

on the mortgage to Gopikabái. The consideration for this arrangement is said to be the relationship between the parties and the giving by Vanarsibái to Nathibái and Ganpatráv her son by Harischandra, of an "authority paper," the reference apparently being to the last-mentioned Maráthi assignment of the equity of redemption. The deed then closes with a provision that as no interest is to be charged and it will be unnecessary to let any part of the house to a tenant, Vanarsibái and her husband should live in the house with their daughter-in-law Nathibái and their grandson Ganpatráv.

By an unregistered English deed of the 26th August 1860 Gopikabái, in consideration of natural love and affection, assigned to Nathibái the bond of the 30th July 1851, and the debt secured and all benefit derived therefrom, and all the estate, right, title, interest, property, claim, and demand whatsoever, both at law and in equity, of Gopikabái in, to, or concerning the same.

No further payment has been made on account of the bond so passed by Vanarsibái to Gopikabái, and by her assigned to Nathibái.

In 1861 or 1862 Damodar Jagannath adopted a son, Ramchandra Damodar, in the place of his grandson Ganpatráv, who was the son of his predeceased son Harischandra, and had died shortly before.

On the 16th February 1867 Vanarsibái mortgaged the property for Rs. 500 to Ramchandra Sakham. This deed, attested by Damodar, was acknowledged before the Sub-Registrar of Bhuleshvar on the 27th April 1867, and by him registered on the 29th May 1867. It contains covenants by Vanarsibái for repayment, title, quiet enjoyment, and further assurance, with a proviso for redemption and reconveyance, and a power of sale to the mortgagee after one month's notice in case of default, and to call in the mortgage immediately in case of destruction or injury of the mortgaged premises by fire or tempest. Endorsements show the payment on account from time to time of various sums aggregating Rs. 340.

In 1868 Vanarsibái died, and on the 16th December 1872 her husband Damodar and adopted son Ramchandra executed a deed of further charge to Ramchandra Sakham for a further advance of Rs. 300. After reciting the last-mentioned mortgage by Vanarsibái, and her death, leaving the present mortgagors her sole legal representatives, the deed purports to convey the premises to Ramchandra Sakham in consideration of the sum of Rs. 800, with a proviso of redemption and reconveyance, and covenants by the mortgagors for repayment and title and power of entry to the mortgagee in case of default in payment with a covenant for further assurance. There is also a power of sale to the mortgagee, with a proviso that it shall not be exercised without default or notice, but is not conditional thereon, and provisos regarding the application of the purchase-money and the reservation of the right of foreclosure. This deed was registered on the 31st December 1872. Default being made in payment of the mortgage last-mentioned, the mortgagee exercised his power of sale by public auction on the 2nd January 1878, when the property was knocked down to Lakshman Vishvanath for Rs. 925.

The conveyance dated 5th January 1878, executed by Ramchandra Sakham to Lakshman Vishvanath, after reciting the last-mentioned mortgage, the death of Damodar in 1874, leaving Ramchandra Damodar his sole heir, the default in payment of the mortgage, and the auction-sale, conveys the property to Lakshman in consideration of the sum of Rs. 925, and covenants for further assurance. Almost immediately after this, Lakshman Vishvanath resold and conveyed to Ramchandra Sakham for Rs. 1,000 on the 14th February 1878.

In 1878 Ramchandra Damodar filed his petition and schedule in the Insolvent Court, and entered Ramchandra Sakham as an admitted creditor for Rs. 619. In the remarks column the insolvent admits the mortgage by his adoptive father and himself for Rs. 800, and states that the purchase at the auction-sale was by the mortgagee in the name of a nominee for Rs. 925.

To this point, then, it would appear that, despite the assignment to Nathibái of the equity of redemption and the mortgage-bond, Vanarsibái and her representatives had continued to act as though they were still absolutely entitled to deal with the property. But there is nothing to show that Nathibái was aware of their so doing.

In 1879 Ramchandra Sakham sued in this Court to eject Nathibái and Ramchandra Damodar, who still continued to live in the house. At the trial, Ramchandra Damodar swore he had no interest in the premises. Nathibái set up her present claim and the plaintiff's pleader elected a non-suit.

By an indenture of the 8th June 1883 Ramchandra Damodar mortgaged the premises to the present plaintiffs for Rs. 1,000, with powers of sale and entry, and covenants for title and further assurance, and on the 21st January 1885 he executed a deed of further charge for Rs. 500.

In a second schedule filed in the Insolvent Court in 1885 Ramchandra Damodar has entered the present plaintiffs as admitted creditors for the sums of Rs. 1,000 and 500, which in the remark column he describes as due on "bonds," but without mention of any deed of mortgage, or of the house as a security. Default having been made by Ramchandra Damodar in payment of the last-mentioned mortgage and further charge, the plaintiffs on the 8th January 1886 advertised the property for sale by auction on the 18th.

At or just before the sale Nathibái caused printed hand-bills, dated the 17th January 1886, to be distributed setting up her title to the property as the rightful and absolute owner in possession for many years past, and denying that she had ever created or authorized Ramchandra Damodar to create any encumbrance, or that the plaintiffs or any one else had any right, title, or interest in the property.

The sale, however, proceeded, and was held subject to certain conditions of sale, which were read aloud before the bidding commenced. The only one of these material to the present suit is the ninth condition, which runs as follows: "The vendors shall not be bound to give any better title to the purchaser than they themselves possess, and the purchaser shall take the premises sold with such title as the vendors can give him."

1887.

MOTIVAHU
vs.
VINAYAK
VIRCHAND.

1887.

MOTIVAHU
vs.
VINAYAK
VIRCHAND.

The defendant, who is an Assistant Surveyor in the Collector's office on a salary of Rs. 90 per mensem, first heard of the intended sale on the day it took place. He knew nothing of the property, but was very anxious to buy, presumably for the purpose of re-selling at a small profit during the month allowed him by the conditions of sale for completion. This he would probably not find much difficulty in doing, as the property is conveniently situated on the main road. He accordingly attended the sale shortly after the proceedings had commenced, but he heard this ninth condition read. He made the last and highest bid for Rs. 1,075, for which sum the property was knocked down to him.

Nathibái's notice was not read to or in the hearing of the defendant, but while the bids were going on, he heard the second plaintiff and his agent Bhiku announcing generally to the by-standers that the old woman living in the house claimed to be the absolute owner.

After the property had been knocked down to the defendant, the Pársi auctioneer informed him that Nathibái was the claimant. Defendant then signed the conditions of sale and an agreement to pay the balance of the purchase-money within a month, and paid the deposit of Rs. 270 or 25 *per cent* as provided by the third condition of sale.

On the 21st January 1886 Ramchandra Sakhamam sent through his solicitor a notice to the defendant stating the mortgage and further charge to himself and his sale to and subsequent purchase from Lakshman Vishvanath in 1878, and required him not to complete the purchase. The defendant then making further inquiries discovered that Ramchandra Damodar had never had any title to the premises and consequently that his mortgagees could make no title to them. He accordingly through his solicitors sent the plaintiffs a notice of the 13th February 1886, calling on them to satisfy him that they had a good title or to refund the deposit. To this they replied through their solicitors on the 5th March 1886 relying on the ninth condition of sale and calling on the defendant to complete the purchase within eight days. The defendant not having complied with this requisition, this suit was filed on the 5th May 1886 for the balance of the purchase-money, Rs. 805, and under the eighth condition of sale for interest thereon, Rs. 15-8, at 9 *per cent per annum* from the 19th February 1886, the date allowed by the fifth condition of sale for the completion of the purchase.

It is clear from the facts above stated that the plaintiffs, as the mortgagees of Ramchandra Damodar, could give the defendants no title whatever to the premises, unless Ramchandra Damodar acquired one between the date of his declaration on oath in this Court in 1879, that he had no interest whatever in the property, and the date of his mortgages to them in 1883 and 1885. It is not pretended that he ever acquired any such title, and in his own evidence in this suit he admitted that during the illness of Nathibái he purloined from her box the registered conveyances of the 25th April 1848 and the 31st December 1851, the unregistered cancelled bond of the 1st April 1848, and a few municipal bills made out in Vanarsibái's name, and that he showed those

without the authority or knowledge of Nathibái to the second plaintiff, who was thereby induced to take the mortgage from him and retained in his own possession all the documents so shown to him, except the cancelled bond, which he returned to Ramchandra Damodar, who put it back into Nathibái's box.

But it is said though the vendors can give no title they are excused from being called on to do so by the ninth of the conditions of sale under which the purchaser bought. The vendors do not pretend that they have any title. They simply sell as the mortgagees who have paid the money, it may be on an insufficient title, and now only want to get their money back without giving anything more than they got in exchange, when the purchaser will stand exactly in their place. Of course a man selling property to another without condition is impliedly bound himself to have, and to give to his purchaser, a title to that property. But equally of course he may relieve himself of that implied obligation by special contract, and if the purchaser chooses to buy subject to such terms, he will be bound by them. The question, then, is one of the construction of the condition of sale. The points to be considered in such a case are clearly pointed out in *Best vs. Hamand*.⁽¹⁾ Does the condition oblige the purchaser to assume a fact material to the title as proved, or does it merely exonerate the vendor from proving it? In the former case the purchaser must complete, even should he find on inquiry the fact assumed to be incorrect. In the latter, he is only debarred from calling on the vendor to prove it, but if he can himself show *aliunde* that it is incorrect, he will not be held to his bargain. Of the former class of cases *Spratt vs. Jeffery*⁽²⁾ is an instance; of the latter, *Waddell vs. Wolfe*.⁽³⁾

The present case, I think, belongs to the former class. On a fair construction of the words of the condition as they stand I think their object is not to relieve the vendor from establishing a fact necessary to the title which it may be difficult or expensive or otherwise inconvenient for him to prove, but to oblige the purchaser to take only so much as the vendor has to give him. In fact, the words of this condition seem to me closely to resemble those of the condition in *Spratt vs. Jeffery*⁽²⁾, in which it was held that the purchaser agreeing to purchase the premises, "as the vendor held them," was bound to take them in spite of a defect in the vendor's title. This case has been disapproved in subsequent decisions; but see *Dart's Vendors and Purchasers*, 5th edition, Vol. 11, pages 145 and 146, and note (m) thereto.

But then another point arises, not so much on the words of the condition, as on their effect. It is the duty of the vendor to inform the purchaser of all facts within his own knowledge material to the title, and though the words of the condition may be quite explicit, yet if by reason of the mis-statement or suppression of a fact, which the purchaser was entitled to know, and the vendor bound to communicate, their effect is to mislead the purchaser, he will not be bound.

1887.

MOTIVAHU
vs.
VINAYAK
VIRCHAND.

(1) L. R. 12 Ch. Div. 1. (2) 10 B. & C. 249. (3) L. R. 9 Q. B. 515.

1887.

MOTIVAHU
vs.
VINAYAK
VIRCHAND.

In the present case there is nothing misleading in the actual words of the condition. They do not pretend that the vendors have or can make any title. On the contrary they seem to me rather to suggest the possibility that the vendors' title may be defective. Nor does there seem to me any pretence for saying that the vendors knew, either when they took the mortgage or when they advertised the sale, that they had no title. The fact that they advanced on the security of the premises a sum nearly, if not quite, equal to their full value, is to my mind an argument against the former theory, more cogent than any inference to be drawn from the fact that the document shown to them by Ramchandra Damodar, when obtaining the loan, discloses no legal title in himself. For it must have been a fact notorious in the neighbourhood that he was the adopted son of Damodar Jagannath and Vanarsibái and their only representative on their death. Nor is there anything to show that in the interval between the mortgage and sale any fact had come to the knowledge of the mortgagees tending to show any defect in their title.

But at the time of the sale the plaintiffs knew of Nathibái's claim as stated in her hand-bill, and the case of *Heywood vs. Mallalieu*⁽¹⁾ is an authority for holding that, even where the condition is explicit, yet if there be within the knowledge of the vendor at the time of the sale a material fact not disclosed by the condition as to which he then makes an insufficient statement, the condition will be held to be misleading. In that case the condition of sale stated explicitly that the property, comprising a dwelling-house, was sold subject to all existing easements, but specified no particulars of any easement. Before the sale the vendor's solicitor had been informed of the particulars of an alleged easement, which, if it existed, would practically render the house useless as a dwelling, but he forbore to make any further inquiry as to its existence at the time of the sale. In answer to questions regarding the alleged easement he replied, in general terms, that certain rights were claimed, but he could not tell whether there were any, and the auctioneer thereupon told the purchasers that they might dismiss from their minds all thoughts about the rights in question, as he was sure that they would never be heard of again. In these circumstances it was held that the condition was misleading and not binding on the purchaser.

In the present case the vendors were informed of Nathibái's claim only just before the sale, when they had no opportunity to make any inquiry into it, and then only in the most general possible terms. All the information they had at the time they admittedly imparted in full to the defendant.

But the defendant says they also stated that the old woman had no claim. Of course if they made this as a statement of fact which they had actually ascertained to be true, it would be a misstatement such as would make the condition misleading, and at the least throw on the vendors the onus of proving that the purchaser was not misled by it. I am of opinion that if these words were used they were merely as a statement of opinion, not of fact, for the defendant admits that they were not said in answer to any question, nor addressed to any person

(1) L. R. 25 Ch. Div. 357.

in particular. And he says that, from his own experience as a surveyor in the Collector's office, he is of opinion that on such occasions old women, who have no real rights in the property, generally do advance unsustainable claims in similar terms.

Lastly, I am of opinion that it is by no means satisfactorily proved that these words were used by the vendors. The misstatement was no part of the defendant's original case. It is not alleged in the correspondence, nor did he say a word about it in his examination-in-chief. It was only in his cross-examination, when obliged to admit that he had been informed by the vendors that the old woman who lived in the house claimed to be the absolute owner, that he added, "But they said she had no claim." No other witness than the defendant himself speaks to the use of such words by any one, and he is somewhat vague as to the exact words used and the person who used them. On the other hand, there was no necessity for the vendors to use such words. After imparting, as they did, all the information they had from Nathibai's hand-bill regarding her claim they might safely rely on their condition of sale and there was no reason for them to discuss the goodness or badness of her claim. I must, therefore, hold that no case has been made out of a misstatement such as would render the condition misleading. That condition, in my opinion, not being a misleading one in itself, and obliging the purchaser to accept only such title as the vendors have to give, it follows that my judgment must be for the plaintiffs for the amount claimed and costs.

Verdict for plaintiffs Rs. 820-8-0 and costs Rs. 51 certified.

From this judgment the defendant appealed to the Full Court composed of the Chief and Second Judges, who granted him a rule for a new trial on the three following grounds :

- (1) That the Court had no jurisdiction to entertain the suit.
- (2) That on the facts as found the suit should be dismissed.

(3) The discovery by the defendant of fresh evidence subsequent to the hearing.

At the argument of the rule the Full Court were unanimously of opinion that the rule should be discharged on the first and third grounds and took time to consider their decision on the second, and on the 9th November 1886 the following judgments were delivered :

Mr. SPENCER, Second Judge.—This suit is brought to recover from the defendant the balance of the purchase-money of a house which was put up for sale by auction under the instructions of the plaintiff, and knocked down to the defendant as the highest bidder. The Chief Judge has found on the evidence that the plaintiff as mortgagee never acquired any title whatever to the property, and that consequently he could give none to the defendant. It follows that, if the defendant is required to pay the purchase-money, he will get no consideration whatever

1887.

MOTIVAHU
ES.
VINAYAK
VIRCHAND.

1887.

MOTIVAHU
vs.
VINAYAK
VIRCHAND.

for his payment. The sale was subject to certain conditions, the ninth of which runs as follows: 'The vendors shall not be bound to give a better title to the purchaser than they themselves possess, and the purchaser shall take the premises sold with such title only as the vendors can give him.' The tenth condition further provides for an abstract of title being prepared by the vendors. The question we have to decide is, whether, having regard to the facts as found, under the conditions above quoted, the defendant can be compelled to complete his purchase. I gather from the Chief Judge's judgment that it was in some way orally made known to the purchaser at the sale that the plaintiff was selling as mortgagee, but the conditions of sale themselves, a most inartificially-prepared document, do not state in what capacity he is selling, whether as mortgagee, or as a previous purchaser, or one who has succeeded to the property by inheritance. The conditions simply state that some property will be put up for sale. There is no description of the property, though the conditions state what consequences shall follow if the description proves to be incorrect, and they conclude with the clause I have already set out.

Furthermore, no abstract of title was prepared for inspection by the purchasers. They were left in entire ignorance of the title they were buying. The Chief Judge in his judgment observes: 'Of course a man selling property to another without condition is impliedly bound himself to have and to give to his purchaser a title to that property. But equally of course he may relieve himself of that implied obligation by special contract, and if the purchaser chooses to buy subject to such terms, he will be bound by them.' The question, then, is one of the construction of the condition of sale. Does such a condition, as we have in this case, protect a man who sells, not with a defective title, but with no title whatever? No doubt the text-books when treating on particulars and conditions of sale do state the proposition in very broad terms that a purchaser is bound by a clear stipulation as to title, *e.g.*, an agreement by assignees of a bankrupt to sell his estate "under such title as he recently held the same, an abstract of which may be seen;" or that the purchaser should only have the receipt and conveyance of A. (an equitable mortgagee) and the assignees; an agreement by ordinary vendors to convey such title as they have received from A. and B.; and a condition that the purchaser should accept the vendor's title "without dispute"; or should accept such title as the vendor has.—*Dart's Vendors and Purchasers*, Vol. I. page 150. But so far as I have been able to refer to the cases cited in support of this proposition, there is not one in which the Courts have compelled a purchaser to complete his contract when the vendor has no title whatever to give. In all the cases there has been some defect of title, on which it has been held the purchaser has precluded himself, under the conditions of sale, from relying, to get out of his bargain. The object of special conditions of sale, according to the reported cases, is, first, to protect the vendor from inquiries which he himself may be unable to satisfy, and against objections which he cannot explain away; or, secondly, to oblige a purchaser to assume a particular fact material to the title as proved. A series of decisions have established the distinction between these two classes of cases, but I

have been unable to discover any case which has gone beyond them. The cases of *Best vs. Hamand*⁽¹⁾ and *Spratt vs. Jeffery*⁽²⁾ are good examples of the latter class of cases. In *Best vs. Hamand*⁽¹⁾ the defendant had contracted to purchase land which had once belonged to a Railway Company and had been sold by the company as surplus land. One of the conditions of sale was that the purchaser should assume that the company had done all that was required by the Land Clauses Act to enable them effectually to sell and convey the land as surplus land. On inquiry it was ascertained that the former owner of the land had not waived his right to pre-emption and the title was objected to on that ground. The Court, however, held that the purchaser was bound by the stipulation to admit the title of the company to sell to the vendor. In *Spratt vs. Jeffery*⁽²⁾ the plaintiff sold to the defendant two leases of certain premises, with the goodwill of the business carried on therein, as he held the same without requiring the lessor's title. The lessors were trustees, and one of the leases was in reversion which they had no power to grant. The Court held that the meaning of the agreement was that the vendee was to purchase the leases without inquiring into the title of the lessor, and could not refuse to complete his purchase on account of an objection to that title. The circumstances of these two cases differ entirely from the present. In both of them the purchasers would undoubtedly receive some consideration for their money. In *Best vs. Hamand*⁽¹⁾ if the first owner exercised his right of pre-emption he would have been bound to recoup the purchaser his outlay. In *Spratt vs. Jeffery*⁽²⁾ the assignor of the leases was in actual possession of the property, and it did not appear that the defendant, the assignee, would have been disturbed during the currency of the lease, and, if he were, he had a remedy against the trustees in damages. In both cases the Court decided that the stipulations were a fair warning to the purchasers that there was something doubtful in the title as to a particular point. I do not think that from either of these cases can the principle be deduced that the Court would have compelled performance of the contracts if the vendors had no title whatever. The strongest case I have been able to find in support of the plaintiff's contention is *Freme vs. Wright*,⁽³⁾ which was a sale by the assignee of a bankrupt under such title as the bankrupt recently held the same, an abstract of which may be seen. I have not been able to refer to the report of this case, and am therefore ignorant of its facts, but the observations of Page Wood, V.C., on the case in *Edwards vs. Wickwar*,⁽⁴⁾ are pertinent to the present inquiry. His Lordship observes: "There may be cases like *Freme vs. Wright*⁽³⁾ where assignees of a bankrupt have stipulated that such title only as the bankrupt had should be required by the purchaser, but even in that case it has been thought a stretch of the jurisdiction of the Court to force the title on a purchaser." What I have cited was no doubt an *obiter dictum*, but it is the *dictum* of a very eminent Equity Judge, who was afterwards Lord Chancellor. I have said that if the conditions of sale are

1887.

MOTIVAHU
vs.
VINAYAK
VIRCHAND.

(1) L. R. 12 Ch. Div. 1.

(2) 10 B. & C. 249.

(3) 4 Madd. 364.

(4) L. R. 1 Eq. 68 at page 70.

1887.
 MOTIVAHU
 vs.
 VINAYAK
 VIRCHAND.

unambiguous the Courts will compel a purchaser to accept a defective title. It may be asked, what is a defective title? Is a scintilla of title sufficient to enforce performance? The answer to this is that no hard-and-fast rule can be laid down: each case must depend on its own special circumstances, and the conditions of sale. It is sufficient to say that, in my opinion, a Court of Equity will not decree specific performance when property has been sold with such a condition as we are now considering, if the vendor has (as it has been found in this case) absolutely nothing to sell. For the reasons I have given I am of opinion that this suit cannot be maintained and ought to be dismissed.

Mr. HART, Chief Judge.—I am unable to concur unreservedly. Though I felt, and still feel, doubt as to the correctness of my original judgment, yet as all the points suggested by the learned Second Judge were present to my mind and considered by me before delivering it, I think the best course would be for me to adhere to it, and obtain the opinion of the High Court on a reference which I should have been willing to make in the first instance had I been asked to do so.

The doubt which most pressed me was that which apparently most influenced the Second Judge in arriving at a contrary result, viz., that the reported cases in which the purchaser was held to his bargain seem to be cases in which what was sold was a defective title, whereas here it is no title. But this seems to me a question of degree only, not of principle. If the purchaser is bound by the condition to pay for whatever the vendor can give, I apprehend the principle is the same, whether what can be given is all or a good deal, or little or nothing. Stress is laid on the *obiter dictum* in *Edwards vs. Wickwar*⁽¹⁾ throwing doubt on *Freme vs. Wright*.⁽²⁾ In spite of the great respect undoubtedly due to the opinion of the learned Judge enunciating that *dictum*, I am unable to attach great importance to it, not only because it was not necessary to the decision of the case before him, nor because he omits to specify any case or authority in which or by which the decision in *Freme vs. Wright* was held to be 'a stretch on the jurisdiction of the Court,' but also because that decision is cited without disapproval as settled law in all the latest editions of all the best text-writers. See Davidson's Conveyancing (4th edition), Dart's Vendors and Purchasers (5th edition), and Fry's Specific Performance (2nd edition). On the other hand, *Hume vs. Pocock*⁽³⁾ is an authority for holding that a condition of sale may preclude a purchaser from showing that the vendor has no title and is so cited in Seton on Decrees (4th edition).

Another doubt that suggested itself to my mind was whether the plaintiffs having notice in general terms of a claim by Nathibái were bound to postpone the sale for the purpose of sifting it. I can find no authority for saying a vendor is bound to investigate his own title. That is the duty of the purchaser. No doubt, if the vendors had sifted Nathibái's claim and found the title was in her and not in them, and had then misrepresented or suppressed the result

(1) L. R. 1 Eq. 68.

(2) 4 Madd. 364.

(3) 1 Ch. 379.

of their investigation, as in *Heywood vs. Mallalieu*⁽¹⁾, the sale would not be upheld. But they made no such investigation, and there is no reason for saying they ought to have made it, but did not, because they knew or suspected what the result would be. Probably they thought, as the purchaser admits he thought, that "old women generally do make such claims without any grounds." On the other hand, they did give the purchaser all the information they had themselves, viz., that Nathibái claimed to be the absolute owner of the property. He however chose to buy admittedly on his own judgment, and because he thought old women generally do make such claims without any grounds. In other words, he bought, subject to the ninth condition of sale, a chance which he thought at the time to be a good one, but which turned out to be a bad one. It is not therefore, in my opinion, strictly correct to say that the defendant purchased without any consideration whatever. I am unable to see that the fact that no abstract of title was prepared before the sale for the inspection of intending purchasers affects the question. The tenth condition does not provide for this, and it was not contended before me that the vendors were bound to follow such a course which would certainly be an unusual one.

On reconsideration, then, I adhere to my former opinion that the plaintiff is entitled to recover, and that this rule ought to be discharged.

It will be seen from the judgments that the point on which the Judges differ is not as to the meaning of the words in the ninth condition of sale, but as to the effect which the Court ought to give to that condition.

The question, then, which we respectfully submit for the opinion of their Lordships the Judges of the High Court, is whether the defendant purchasing under the said ninth condition of sale in the facts hereinbefore set forth is liable to pay to the plaintiffs the balance of purchase-money. If the answer be in the affirmative, the present decree for the plaintiffs will stand, and execution, which has been stayed pending this reference, will be ordered to issue thereon. If the answer be in the negative, the decree will be set aside, and the suit will be dismissed with costs to the defendant to be paid by the plaintiffs, Rs. 51; costs of the rule for a new trial, also Rs. 51, will abide the result of the reference.

No sum has been ordered to be deposited in this Court to cover the costs of the reference, as is usual, as this is not a reference sought by either of the parties but is necessarily made by the Court on a difference of opinion between the Judges under the provisions of section 69 of the Small Cause Court Act.

No one appeared for the plaintiff.

Vicaji for the defendant cited *Seaton vs. Mapp*;⁽²⁾ *Cooper vs. Phipps*;⁽³⁾ *In re Banister, Broad vs. Munton*;⁽⁴⁾ *In re Marsh and Earl Granville*.⁽⁵⁾

(1) L. R. 25 Ch. Div. 317.

(2) 2 Coll. 556.

(3) L. R. 2 H. L. 149.

(4) L. R. 12 Ch. D. 131.

(5) L. R. 24 Ch. D. 15.

1887.

MOTIVAHU
vs.
VINAYAK
VIRCHAND.

1887.

MOTIVAHU
vs.
VINAYAK
VIRCHAND.

JUDGMENT OF THE HIGH COURT (Sargent, C.J., and Farran, J.)

It must be taken as found, for the purposes of this reference, that the vendor had no title whatever, being a mortgagee under one Ramchandra Damodar, who had stolen the title-deeds from one Nathibái, the real owner of the property in question, who is now, and always has been, in possession. It has also been found that, just before the property was knocked down to the defendant, he was informed that Nathibái made a claim, but that he was not told, as the defendant contended he was, that there was nothing in her claim; and lastly, that he was not told anything making the ninth condition misleading.

The question referred to us is, whether under these circumstances the defendant was bound to complete his contract of purchase, having regard to the ninth condition of sale under which the property was advertised for sale, and which is in the following terms: "The vendors shall not be bound to give any better title to the purchaser than they themselves possess, and the purchaser shall take the premises sold with such title only as the vendors can give him." This present action is, in form, to recover the residue of the purchase-money, but it is virtually one to compel specific performance, and must be governed by the principles applicable to such a suit.

Apart from any special consideration arising from the information given to the Defendant at the sale, the question for determination is whether, having regard to the ninth condition of sale, the Court should compel the purchaser to complete the purchase, when the vendor has no title of any sort, and not even the possession to offer to the purchaser.

In *Freme vs. Wright*,⁽¹⁾ where the property of a bankrupt was sold by the assignee under a similar condition the purchaser was compelled to take such title as the bankrupt had. But all that appears in that case is that the bankrupt had not a good title.

However, in *Edwards vs. Wickwar*,⁽²⁾ Vice-Chancellor Wood, referring to *Freme vs. Wright*,⁽¹⁾ says that, notwithstanding the special circumstance in that case, of the vendor being the assignee in bankruptcy, it has been thought a stretch of jurisdiction of the Court to force the title on the purchaser. It may doubtless

(1) 4 Madd. 364.

(2) L. R. 1 Eq. 68.

be said that such a condition of sale gives the bidder notice that the vendor's title is a questionable one, and, if he chooses to purchase with that knowledge, he ought to be kept to his bargain. But no purchaser reading that condition would suppose that the vendor had no claim of any sort or kind to the property, not even such *prima facie* title as is evidenced by possession.

In *Seaton vs. Mapp*,⁽¹⁾ Vice-Chancellor Knight Bruce states, in admirable language, the principle on which conditions of sale are to be construed. He says: "I think, and have always thought, that when a vendor sells property under stipulations which are against common right, and place the purchaser in a position less advantageous than that in which he otherwise would be, it is incumbent on the vendor to express himself with reasonable clearness. If he uses expressions reasonably capable of misconstruction, if he uses ambiguous words, the purchaser may generally construe them in the manner most advantageous to himself." Applying this principle to the present case the purchaser is, in our opinion, entitled to say that the stipulation contained in the ninth condition implied that the vendors had some title, however defective it might be. As to the information the defendant received at the auction, it certainly gave him no notice to the contrary. The question referred to us must, therefore, be answered in the negative.

Plaintiffs in person.

Attorneys for the defendant—*Balkrishna and Bhagvandas*.

ABDUL RAHIM ABDUL KADER, PLAINTIFF, versus HAJI UMAR

SUMAR, DEFENDANT.

MESSRS. EWART, LATHAM, AND COMPANY, CLAIMANTS.

1887.

Sept. 9.

Distress warrant—Property belonging to the person from whom rent is claimed—Liability of property pledged to attachment—Presidency Small Cause Courts Act XV. of 1882, sec. 57.

The plaintiff as landlord attached hides and skins in a tannery of which the defendant was tenant. The defendant had bought these skins and the claimants had in effect advanced him money to pay for them under a general working agreement. To cover such advances the defendant had given to the claimants a lien upon the goods, and for the purpose of preserving it they kept a man upon the premises to

(1) 2 Coll. 556, at page 562.

1887.

ABDUL RAHIM
ABDUL KADER
es.

HAJI UMAR
SUMAR.

take possession of the hides and skins and see that they were not removed while under process. When finally worked up the hides and skins were to be shipped to England through the claimants, who were to re-pay themselves their advances out of the proceeds of sale.

Held, that the goods were not liable to be seized under section 57 of Act XV. of 1882 as property belonging to the defendant, but that the claimants as pledgees were the true owners of the goods.

CASE stated for the opinion of the High Court under section 69 of Act XV. of 1882, by N. Spencer, Acting Chief Judge.

1. The plaintiff in this case issued a distress warrant under sections 53 and 54 of the Presidency Small Cause Courts Act (XV. of 1882) to recover from the defendant the sum of Rs. 600, being six months' rent at Rs. 100 *per mensem*, of certain premises at Dharavi, used and occupied by the defendant as a tannery.

2. In pursuance of this warrant the bailiff seized a quantity of hides and skins found on the premises mentioned in the warrant.

3. Messrs. Ewart, Latham, and Company claimed the hides and skins which were seized, and under section 61 of the Act a summons was issued calling the claimants and the plaintiff before the Court.

4. Messrs. Ewart, Latham, and Company's claim was based on an agreement entered into with them by the defendant under date the 9th of July 1885.

5. The defendant rented the tannery from the plaintiff on the 20th of May 1886. There was no evidence to show that the plaintiff was aware that the defendant had entered into the agreement referred to in the preceding paragraph.

6. It will be seen from the agreement that the claimants, Messrs. Ewart, Latham, and Company, undertake to advance to the defendant from time to time such sums as shall be requisite for the purpose of enabling the defendant to purchase or pay for skins and hides, or for tanning the same into leather, or otherwise converting the same into a more saleable commodity.

7. Messrs. Ewart, Latham, and Company have entered into similar agreements with the proprietors of several other tanneries, and their course of dealing was as follows.

8. When hides, skins, or tanning materials were purchased by the defendant, they were brought to the tannery, where they were inspected by Ewart, Latham, and Company's superintendent, who made an estimate of their value, and arranged what advance should

be made on them. In pursuance of this arrangement the defendant drew an order on Ewart, Latham, and Company for the amount of advance which they paid.

9. At the time when the advances were made the hides and skins were delivered into the possession of Ewart, Latham, and Company; and they remained in their possession while they were undergoing the process of tanning, and after they had been tanned, Ewart, Latham, and Company either sold them here, or shipped them to Europe; where they were sold on defendant's account, and he was credited with the proceeds, less commission, interest, and other charges mentioned in the agreement.

10. Messrs. Ewart, Latham, and Company had a peon stationed at each tannery, in whose possession the hides and skins were kept, and whose duty it was to prevent any hides or skins being removed from the tannery without the sanction of that firm.

11. On the whole account there is now a large balance due to Ewart, Latham, and Company, far exceeding the amount of rent due.

12. It was contended on behalf of Messrs. Ewart, Latham, and Company, that the hides and skins did not belong to the person from whom the rent was claimed, and were not liable to be seized.

13. In the year 1879 it was decided by a bench of two Judges of this Court, under section 10 of Act I. of 1875, from which section 57 of Act XV. of 1882 has been copied, that household furniture which had been mortgaged by a tenant but remained on the demised premises was not liable to be seized for rent due.

14. Following the principle of this decision I allowed the claim made by Messrs. Ewart, Latham, and Company, and directed that the money which they had deposited in Court to have the attachment removed should be refunded to them.

15. I have been asked by the plaintiff to state a case for the opinion of the High Court, and as the question is one of considerable importance to landlords and is likely frequently to arise in this Court, I have consented to do so.

16. I now solicit the decision of their Lordships on the following question:—Were the hides and skins liable to be seized under section 57 of Act XV. of 1882?

17. If the answer to this question is in the affirmative, the distress warrant will stand good for Rs. 400, the amount of rent which, on the evidence, I find due to the plaintiff.

1887.

ABDUL RAHIM
ABDUL KADER.

vs.

HAJI UMAR:
SUMAR.

1887.

ABDUL RAHIM
 ABDUL KADER
 vs.
 HAJI UMAR
 SUMAR.

18. The plaintiff has deposited in Court the sum of Rs. 50 for the costs of this reference.

JUDGMENT OF THE HIGH COURT (Sargent, C.J., and Farran, J.)

The question in this case arises in the construction of section 57 of the Presidency Small Cause Courts Act, 1882, which directs the bailiff of that Court, in pursuance of a distress warrant, to seize the moveable property found in or upon the house or premises mentioned in the warrant, and belonging to the person from whom the rent is claimed, sufficient to cover the amount of the said rent.

The property seized in this case consisted of hides and skins in a tannery of which Abdul Rahim is the landlord. Haji Umar, the tenant, bought the hides and skins, and Ewart, Latham, and Company in effect advanced him money to pay for them under a general working agreement. To cover such advance Haji Umar gave Ewart, Latham, and Company a lien upon the goods, and for the purpose of preserving it, Ewart, Latham, and Company kept a man upon the premises to take possession of the hides and skins and see that they were not removed while under process. When finally worked up, the hides and skins were to be shipped through Ewart, Latham, and Company to England, and out of the proceeds they were to repay themselves their advances. The question is—Did the hides and skins belong to Haji Umar or to Ewart, Latham, and Company within the meaning of the section? or, in other words, who was the owner of the goods? The pledgor or the pledgee? The Small Cause Court has held since 1879 under a similar section, and in this case under section 57 of the Act which now regulates its procedure, that the pledgee is the owner, and we think correctly so.

Under the numerous Bankruptcy Acts passed previous to 1882, the pledgee of goods left in the order and disposition of the bankrupt has always been treated as their true owner. See Tudor's *Mercantile Cases*, page 738, *Ryall vs. Rowles*.⁽¹⁾

Section 266 of the Civil Procedure Code, which enumerates the different kinds of property liable to attachment and sale, contains a similar expression: "All other saleable property . . . belonging to the judgment-debtor" is liable to attachment and sale; but it has

(1) 1 Ves. 348.

always been held under this section that a mortgagee or pledgee of such property can come in and raise the attachment upon it, in whole or in part, by reason of his mortgage or pledge. Chapter VIII. of the Presidency Small Cause Courts Act appears to us to give the landlord a summary remedy by distress warrant for the recovery of his rent, but, abolishing *in toto* the old law of distress, leaves him as regards the property, which he is entitled to seize, in the same position as an ordinary creditor.

We answer the question in the negative.

HASSUMBHAI VISRAM AND OTHERS, PLAINTIFFS, versus THE
BRITISH INDIA STEAM NAVIGATION COMPANY,
LIMITED, DEFENDANTS.*

1887.

ABDUL RAHIM
ABDUL KADER
vs.
HAJI UMAR
SUMAR.

1888.

June 29.
July 19 & 20.

Ship and shipping—Bill of lading, exemptive clause in—Stowage—Negligence of the crew or other servants of the ship—Period of loading covered by the contract of carriage—Fitness or unfitness of the ship.

The plaintiffs shipped certain bags of sugar on the 11th and 12th November 1887 on board the defendant's ship "Byculla" for conveyance to Bombay. There being a dispute as to the number of bags shipped, no mate's receipt was given and no bill of lading was signed until the 28th November. The "Byculla" started on her voyage on the 15th November, and duly delivered the sugar in Bombay. The sugar, however, was found to be damaged by water, which was due to its having been stowed in immediate proximity to a quantity of wet timber. The plaintiffs sued the defendants in the Small Cause Court for the damage so caused. The defendants sheltered themselves under the terms of the exemptive clause in their bill of lading of the 28th November, which clause ran as follows: "The act of God, the Queen's enemies ** and all the perils, dangers, accidents of the sea, and accidents, loss, or damage from any act, neglect, or default whatsoever of the pilot, master, or mariners or other servants of the company or from any deviation excepted." The plaintiffs contended that a bill of lading did not relate to or cover the period of loading, and that, even if it did, the exception relied upon in this bill of lading referred only to negligence subsequent to the commencement of the voyage. They also contended that the ship was not a ship "reasonably fit for the voyage" within the meaning of the rule laid down in *Steel vs. The State Line Steamship Company*.⁽¹⁾

In the Small Cause Court, judgment was given in the plaintiff's favour. On appeal to the High Court on a case stated, this judgment was reversed.

Held, that this was not a case to which the rule laid down in *Steel vs. The State Line Steamship Company*⁽¹⁾ applied, as there was no question here of any defect inherent in the ship. It was simply a case of negligent and improper stowage.

* Reported at I. L. R. 13 Bom. 571.

(1) L. R. 3 App. Cas. 72.

1888.

HASSUMBHAI
VISRAM
vs.
BRITISH INDIA
STEAM
NAVIGATION
COMPANY.

Held, further (following *Hongkong and Shanghai Banking Corporation vs. Baker*,⁽¹⁾ that the reasonable mode of construing the contract evidenced by a bill of lading was to hold the exceptions to be co-extensive with the liability, and that there was no evidence to be found in this bill of lading of any other intention.

Held, further, that the goods were covered by the bill of lading from the time they were put on board to be loaded, consequently the defendants were protected from liability under the exemptive clause.

The Duero ⁽²⁾ and *Hayn vs. Culliford* ⁽³⁾ commented on and followed.

CASE stated for the opinion of the High Court by W. E. Hart, Chief Judge.

1. The following extracts from my judgment indicate sufficiently the question of law on which the opinion of the High Court is desired and the grounds for my decision thereon.

2. The plaintiffs, abandoning the excess above Rs. 2,000, sue the British India Steam Navigation Company to recover that sum as damages occasioned to 1,046 bags out of a consignment of 1,306 bags of the plaintiff's sugar by their negligent stowage on board the defendant's steamer "Byculla" in the same hold with a quantity of wet timber on a voyage from Rangoon to Bombay.

3. There is no doubt that when the sugar, the subject of this suit, was landed in Bombay early in December 1887, it was all, more or less, damaged by wet. But the defendants deny that the damage was caused as alleged by the plaintiffs, and say that the sugar was shipped in a wet and damaged condition. They also dispute the *quantum* of damage. Finally, they plead exemption from liability under the exceptions in the bill of lading.

4. The sugar, which had been imported by the plaintiffs into Rangoon about a year before, was shipped on the 11th and 12th November 1887 for Bombay on board the "Byculla." No mate's receipt was given for it to the shippers at the time of shipment owing to a dispute as to the exact number of bags put on board; the shippers declining to accept a receipt for 1,302 bags, the number tallied by the ship's officers, while the mate refused to sign one for 1,306 bags, the number tallied by the shippers.

5. Owing to the non-production by the shippers of the mate's receipt, no bill of lading was granted for the plaintiff's sugar before the steamer left Rangoon on the 15th November. Subsequently,

(1) 7 B. H. C. R. (O. C. J.) 186.

(2) L. R. 2 A. & E. 393.

(3) L. R. 4 C. P. D. 182.

nowever, on the 28th November 1887, a bill of lading was signed by the defendant's branch at Calcutta, and it is on the exceptions in this document that the defendants rely as relieving them from responsibility.

6. This bill of lading purports to be for 1,306 bags of sugar bearing the plaintiff's marks and weighing 168 lbs. each (of which, it is stated in the margin, four bags are in dispute and to be delivered if on board) "shipped in good order and well conditioned by Visram Ebrahim & Company in the s.s. 'Byculla' now at sea proceeding from Rangoon, and bound for Bombay and intermediate ports, to be carried and delivered subject to the conditions after mentioned, including those at the foot of this bill of lading, in the like good order and well conditioned at the port of Bombay."

7. Then follows an exception of damage from various specified causes, not material to consider now in detail, which, however, speaking generally, must, I think, be taken as descriptive of the perils of the voyage after navigation has commenced.

8. Following this comes the exception relied on by the defendants, which is worded as follows: "And accidents, loss, or damage from any act, neglect, or default whatsoever of the pilot, master, or mariners, or other servants of the company, or from any deviation excepted."

9. At the foot of the bill of lading are the conditions referred to in it. Those material to the present case, as relied on by the defendants, are as follows: "Weight, contents, and value when shipped unknown. The company is not to be responsible for damage resulting from (a number of specified causes not material to be considered now) or for the condition or contents of re-exported goods."

10. Just above the signature are written the words "Bags old. Not responsible for condition or contents."

11. The case of *Phillips vs. Clark*,⁽¹⁾ decided in 1857, is authority for the proposition which, however, has now long been settled law, that a carrier by sea can contract himself out of the consequences even of his own negligence. But it also decides that such a construction ought not to be put on a contract unless it is unambiguous in its terms. Twelve years later, in 1869, was decided the case of

1888.

HASSUMBHAI
VISRAM
vs.
BRITISH INDIA
STEAM
NAVIGATION
COMPANY.

(1) 26 L. J. C. P. 168.

1888.

HASSUMBHAI
VISKAM
vs.
BRITISH INDIA
STEAM
NAVIGATION
COMPANY.

The Duero,⁽¹⁾ which in some of its general features strongly resemble the present. In that case an exception in the bill of lading of "barratry, negligence, or default of master, pilot, or mariners, or others performing their duties, vermin, jettison, and also accidents of navigation of every kind" was held to exempt the shipowner from the consequences of damage to cargo occurring during the voyage, but occasioned by careless stowage.

12. It is to be noticed, however, that there are also points of distinction between the two cases in certain significant particulars.

13. In the first place, in the case of the goods on board *The Duero*, the bill of lading, though given after the goods had been stowed, was in substitution for a mate's receipt granted before the goods were stowed.

14. Secondly, the wording of the exception in the bill of lading of *The Duero* seems to me more expressly than do the words of the bill of lading of the "*Byculla*," to cover an act of negligence on the part of the ship's crew committed before the commencement of the voyage. For in the former the negligence of the master is excepted before that of the pilot, and the whole clause, excepting the negligence of those connected with the ship, precedes the separate clause excepting "accidents of navigation of every kind." In the latter, however, the exception of the accidents of navigation precede the separate clause excepting the neglect of those connected with the ship; and this last-mentioned clause, in mentioning the pilot before the master, and including deviation, points rather to the inference that the negligence to be excepted is that occurring during the voyage.

15. Thirdly, the damage to the goods on board *The Duero*, though occasioned by careless stowage before the commencement of the voyage, seems to have wholly occurred in the course of the voyage, and after signature of the bill of lading. Whereas, if the damage to the plaintiff's goods was occasioned, as alleged, by their being stowed in a wet hold and saturated with the drippings from wet timber, a portion at any rate of the damage must have occurred before the commencement of the voyage, during the three days that the steamer was lying at Rangoon after receipt of the sugar, and nearly all, if not the whole, of the damage must have occurred

(1) L. R., 2 A. & E. 393.

before the signature of the bill of lading, seventeen days after the shipment of the sugar, and thirteen days after the commencement of the voyage, which was completed in three weeks.

16. Lastly, in considering the case of *The Duero* with reference to the two cases next to be mentioned, it would appear, though not expressly stated, that she was reasonably fit to carry the cargo which she received. Otherwise, such a point would surely have been noticed in the argument or the judgment, and there is nothing which can lead us to infer that she was not, in the description either of the nature of the negligence, or of the nature of the damage, neither of which is exactly specified in the report.

17. Eight years after *The Duero* in 1877 it was decided by the House of Lords in the case of *Steel vs. The State Line Steamship Company*,⁽¹⁾ on the construction of a bill of lading containing a special clause which exonerated the shipowners from perils of the seas howsoever caused, including negligence of the crew, that the perils excepted were those subsequent to the loading of the cargo on board, and that there was an implied contract on the part of the shipowner to supply a ship reasonably fit for accomplishing the service which he engaged to perform.

18. In applying this case yet seven years later in 1884, the Court of Queen's Bench held, in *Tattersall vs. The National Steamship Company*,⁽²⁾ that a clause in a bill of lading that the shipowners or their agents or servants are, "as respects these animals (which formed the cargo, the subject of the bill of lading) in no way responsible for either their escape from the steamer, or for accidents, disease, or mortality, and that under no circumstances shall they be held liable for more than £5 for each of the animals," related only to the carriage of the goods on the voyage and did not restrict or affect the primary obligations of the shipowner to have the ship reasonably fit to receive the goods.

19. In the present case the bill of lading, which is not in substitution for any previous mate's receipt, on the face of it represents the goods not only as already shipped and stowed but as actually on the voyage. The exception in the body of the instrument does not in unambiguous terms include negligence of the

1888.

HASSUMBHAI
VISRAM
vs.
BRITISH INDIA
STEAM
NAVIGATION
COMPANY.

(1) L. R. 3 App. Ca. 72.

(2) L. R. 12 Q. B. D. 297 at page 298.

1888.
 HASSUMBHAI
 VISRAM
 vs.
 BRITISH INDIA
 STEAM
 NAVIGATION
 COMPANY.

defendants' servants before the commencement of the voyage. Nor is there any term of the contract declaring the defendants exonerated from the primary obligation of ship-owners to provide a ship reasonably fit to receive the goods which they agree to carry.

20. Therefore, applying the principles enunciated in the cases cited, I must hold, on the construction of the term of the bill of lading, as qualified by the exception in the body of it relied on by the defendants, that the exception relates only to negligence committed subsequent to the loading of the sugar on board, and does not exonerate the defendants from the duty to provide a ship reasonably fit to receive the sugar they undertake to carry.

21. Further, having regard to the collocation of this exception after those already mentioned as for the most part referring generally to perils encountered subsequent to the commencement of the navigation, and having regard also to those points already noticed in contrasting the differences between this exception and that in the bill of lading of *The Duero*, as well in their context as in their express terms, I think that the negligence intended to be excepted by the defendants' bill of lading is negligence committed after the actual commencement of the navigation.

22. Whether in this particular case the operation of the exception is not even still further postponed to the date of making of the bill of lading seems to me to depend on the answer to the question, "Whose fault was it that the bill of lading was not given in the usual way and at the usual time, *i.e.* in substitution for the mate's receipt after the stowing of the sugar on board, but before the steamer started on her voyage."

23. Finding on the evidence that the fault was the plaintiffs, I think the present bill of lading should be held to speak as from the date when it would have been granted in ordinary course. The exception would then relate to any act of negligence during the whole course of the voyage from the commencement of the navigation, but would not relieve the defendants from their liability to provide a ship reasonably fit to receive the plaintiff's sugar at the time it was shipped.

24. But, besides the exceptions in the body of the bill of lading there are the printed conditions following it and incorporated in it by reference, and the written remark above the signature.

25. The first of these conditions and the written remark, I think, amount to nothing more than such a qualification of the words "In good order and well conditioned" occurring at the beginning of the bill of lading, as was held in the case of *Nicol and Company vs. Castle*,⁽¹⁾ to relieve the defendant there from the consequences of an unqualified admission as to the quantity shipped, and would simply operate here in like manner to relieve the maker of the bill of lading from the consequences of an unqualified admission that the goods had been received on board in good order and well conditioned, and of an absolute undertaking to deliver them in like good order and well conditioned.

26. The effect of such words would be merely to throw on the plaintiffs the burden of proving that they did ship their sugar in good condition, and to prevent their using the terms of the defendants' own bill of lading as an estoppel of the denial of that fact.

27. Last comes the condition that the company is not to be responsible for the condition or contents of re-exported goods. It is to be noticed that these words do not go so far as those of the exception on the body of the bill of lading, and declare that the defendants are not to be responsible for loss or damage occurring to re-exported goods after shipment and while in their charge. They merely say that the defendants do not admit any responsibility in regard to the condition or contents of goods received by them for re-exportation. There must be some meaning to be attached to such a difference in expression. I think, therefore, that the last mentioned condition amounts to nothing more than such a qualification as that already noticed of the admission as to condition and contents expressed in the earlier part of the bill of lading, and is intended in like manner to throw on the plaintiffs the burden of proving the condition, nature, and quality of the goods shipped for re-exportation.

28. But however that may be, it is clear that that condition, no more than the others, restricts or affects the primary obligation of the defendants of providing a ship reasonably fit for the carriage of the plaintiff's sugar.

1888.

HASSUMDHAT
VISRAM
vs.
BRITISH INDIA
STEAM
NAVIGATION
COMPANY.

(1) 9 B. H. C. R. 321; ante page 21.

1888.

HASSUMBHAI
VISRAM
vs.
BRITISH
INDIA STEAM
NAVIGATION
COMPANY.

29. One other case was cited in argument, that of *Jellicoe vs. The British India Steam Navigation Company*,⁽¹⁾ as showing that the defendants had previously relied on the same exception in their bill of lading as is pleaded in this case, and that it had received a judicial interpretation giving it the protective effect for which the defendants now contend.

30. I need only refer to that case now to show that it is no authority on the point with which I am at present concerned as to the defendants' primary obligation to supply a ship reasonably fit for the carriage of the plaintiff's goods, as in that case the damage was occasioned and occurred at the very end of the voyage in the act of unloading the goods, and there was no question as to the fitness of the ship to receive them.

31. The questions, therefore, with which I have first to deal are those formulated by Lord Blackburn in his judgment in *Steel vs. The State Line Steamship Company*⁽²⁾: (1) Was the ship reasonably fit for the receipt of the plaintiff's goods? (2) If not, was the damage to them caused by her being unfit?

32. In considering these questions I found that the floor of the hold on which the plaintiff's sugar (which had been put on board in good condition) was stowed had been wetted, before receipt of the sugar, with water brought on board by logs of timber floated alongside in rafts and shipped before the sugar, and that such water could and did get at and damage the sugar.

33. I also found that the bags of sugar after shipment had been further wetted by water brought on board by other logs of timber, shipped in the same way after receipt of the sugar.

34. I also found that the logs of timber were stowed in a heap only two feet from the heap of the bags of sugar, and that the wet from the former could and did get at and damage the latter.

35. Having already found, as appears in the extracts from my judgment, that the sugar was lying in the hold under such conditions for three days before the commencement of the voyage, I answered the first of the two questions formulated, in the last extract above given from my judgment in paragraph 31, in the negative, and the second in the affirmative, and held that the

(1) 1. L. R. 10 Cal.

(2) L. R 3 App. Ca. 72.

defendants were not protected by the terms of their bill of lading, and passed judgment for the plaintiffs with costs.

36. At the request of the defendants' attorneys this judgment was contingent on the opinion of the High Court on the question, whether the defendants were protected from liability by the terms of their bill of lading.

37. That question I accordingly respectfully submit for the consideration of their Lordships.

Inverarity and *Jardine* for defendants.

Badrudin Tyebji for plaintiffs.

JUDGMENT OF THE HIGH COURT (Sir C. Sargent, C.J., and
Bayley, J.)

The Chief Judge found that the sugar had been imported by the plaintiffs into Rangoon about a year before, and was shipped on the 11th and 12th November 1887 for Bombay on board the "Byculla:" that no mate's receipt was given for it to the shippers at the time of shipment, owing to a dispute as to the exact number of bags put on board, the shippers declining to accept a receipt for 1,302 bags the number tallied by the ship's officers, while the mate refused to sign one for 1,306 bags, the number tallied by the shippers: that owing to the non-production by the shippers of the mate's receipt no bill of lading was granted for the plaintiff's sugar before the steamer left Rangoon on the 15th November: that on the 28th November 1887 a bill of lading was signed by the defendants' branch office at Calcutta: that the floor of the hold on which the plaintiffs' sugar (which had been put on board in good condition) was stowed had been wetted before the receipt of the sugar with water brought on board by logs of timber floated alongside in rafts and shipped before the sugar, and that such water could and did get at and damage the sugar: that the bags of sugar after shipment had been further wetted by water brought on board by other logs of timber shipped in the same way after receipt of the sugar: and that the logs of timber were stowed in a heap only two feet from the heap of the bags of sugar, and that the wet from the former could and did get at and damage the latter. The Chief Judge held, on the authority of *The Duero*,⁽¹⁾ that the defendants were bound to provide a ship

1888.

HASSUMBHAI
VISRAM
vs.
BRITISH
INDIA STEAM
NAVIGATION
COMPANY.

(1) L. R. 2 A. & E. 393.

1888.

HASSUMBHAI
VISRAM
vs.
BRITISH
INDIA STEAM
NAVIGATION
COMPANY.

reasonably fit to receive the plaintiffs' goods, that under the circumstances as found by him they had failed to do so, and that on a proper construction of the exceptions in the bill of lading, which he considered only referred to what might occur after the commencement of the voyage, they were not protected from their liability for the damage sustained by the plaintiffs' sugar. The Chief Judge gave judgment for the plaintiffs contingent on the opinion of this Court, on the question whether the defendants were protected by the exceptions in the bill of lading.

The Chief Judge has held, and we think correctly, that the bill of lading, although given to the plaintiffs after the vessel sailed, must, under the circumstances which occasioned the delay, be taken to express the contract between the parties at the time when the goods were received on board. In the case of *The Duero*,⁽¹⁾ a cargo, through the careless stowage of the master and crew, was damaged in the course of the voyage. The bill of lading was not signed till after the cargo was stowed. The damage came within one of the exceptions in the bill of lading, and Sir R. Phillimore says:⁽²⁾ "It has also been urged that this bill of lading being subsequent to the stowing it could not relieve the shipowners from the obligations they were under as carriers to repair the mischief done by improper stowage of the goods. It was not exactly contended that there were two contracts in this case, but it was insisted that the bill of lading did not cover the injury arising from the stowage, which act of stowage took place before the bill of lading was granted. The conclusion at which I have arrived at is that I have only to look at the bill of lading as the expression of the true contract existing between the parties and to consider whether the delivery of these goods in a different condition from that in which they were originally placed on board does or does not fall within the excepted perils mentioned in that bill of lading."

Considering, then, the bill of lading to be the contract of carriage between the parties, the Chief Judge held that the exceptions contained in it referred exclusively to occurrences after the commencement of the voyage, and did not protect the shipowners from the obligation of seeing that the ship was reasonably

(1) L. R. 2 A. & E. 393.

(2) L. R. 2 A. & E. 395.

fit for accomplishing the service which the shipowner engages to perform, as laid down in *Steel vs. The State Line Steamship Company*.⁽¹⁾ It is plain, in the present case, that if the defendants' ship can be said to have been unfit to receive and carry the plaintiffs' goods it was entirely by reason of the negligence of the defendants' servants (see *Sandleman vs. Scurr*)⁽²⁾ in not drying the floor of the ship or dammering it, before placing the sugar on board, and also in stowing the sugar so near to the wet timber previously shipped that the dripping water fell upon it, for it is not suggested that the wet state of the floor was due to any inherent defect in the ship itself, as was the case in *Tattersall vs. The National Steamship Company*.⁽³⁾ In *Hayn vs. Culliford*⁽⁴⁾ sugar was damaged by being stowed under oxide of zinc, and Lord Bramwell, delivering the judgment of the Court, assumed that if the exceptions in the bill of lading had included acts of negligence of agents and servants, the defendants would have been protected; and the same principle must apply to what has been found to be the cause of damage to the sugar in the present case. The question, therefore, for decision is whether the defendants are protected by the exceptions in the bill of lading against the consequences of acts and defaults of their servants, for, otherwise, whether by reason of the implied undertaking that the ship was fit to receive and carry the plaintiffs' goods, or the obligation of the defendants on the ordinary contract of a carrier, as put by the Court in *Hayn vs. Culliford*,⁽⁴⁾ the defendants would be liable.

The proper rule of construction of a bill of lading was much considered by this Court in *The Hongkong and Shanghai Banking Corporation vs. Baker*.⁽⁵⁾ In that case the bills of lading exempted the master from liability from loss occasioned by "the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature or kind soever." The goods were lawfully landed on the Customs House bandar at Bombay, where they were accidentally burned before they were delivered to the consignee. The Court of Appeal, affirming the judg-

1888,

HASSUMBHAI
VISRAM
vs.
BRITISH
INDIA STEAM
NAVIGATION
COMPANY.

(1) L. R. 3 Ap. Ca. 72.

(2) L. R. 2 Q. B. 86.

(3) L. R. 12 Q. B. D. 297.

(4) L. R. 4 C. P. D. 182.

(5) 6 B. H. C. R. (O.C.J.) 71 and in App. 7 B. H. C. R. (O.C.J.) 186.

1888.

HASSUMBHAI
VISRAM
ES.
BRITISH
INDIA STEAM
NAVIGATION
COMPANY.

ment of Sir Richard Couch, held that the master was protected by the above exceptions in the bill of lading. Sir Michael Westropp, in delivering the judgment of the Court, said: "It has been contended for the plaintiffs that the scope of that exception must be controlled by the word 'other' preceding the words 'dangers and accidents of the seas, rivers, and navigation,' but we cannot accede to that argument. Fire, no doubt, may occur at sea as well as on shore, but it never has been regarded as a peril, danger, or accident of the sea, within the meaning of those terms as known to mercantile usage or the law."⁽¹⁾ At page 206 the Court of Appeal says: "The case of *De Rothschild vs. The Royal Mail Steam Packet Company*⁽²⁾ has been referred to us as authority for the proposition that exceptions in a bill of lading should be construed strictly, but in the judgment (attributed in the Exchequer Reports to Parke, B., and by the Law Journal to Pollock, C.B.,) the Court lays it down that the ordinary meaning of the words used must be followed; and the circumstances under which the contract is made must be regarded; and it refused to adopt a meaning which it considered unreasonable or unlikely to be within the intention of the parties. The same doctrine has been applied to charter-parties: *Barker vs. M'Andrew*;⁽³⁾ *Bruce vs. Nicolopulo*⁽⁴⁾, *Brough v. Whitmore*⁽⁵⁾. The use of the word 'other' before 'dangers and accidents of the seas' &c. in the present bill of lading cannot, we think, render 'fire' a peril of the sea or limit it to fire on board the ship. The reasonable mode of construing the contract contained in the bill of lading is to treat the exceptions as co-extensive with the liability. Were we to apply the word 'other' so as to cut down the shipowner's and master's protection against fire to fire occurring on board the ship, we should be equally bound to apply it in the same manner to limit the exception of the acts of God and the Queen's enemies, so that if the goods, even though landed after the expiration of the fifteen days contended for by the appellants, were, whilst yet undelivered, to be destroyed by lightning, or by a hostile force at war with the Queen, the ship-owners and master would be unprotected. This we do not think could have been the intention of the parties." At the conclusion of their

(1) 7 B. H. C. R. (O.C.J.) 202.

(2) 7 Ex. 734, 21 L. J. Ex. 273.

(3) 18 C. B., N. S. 759.

(4) 11 Ex. 129, 24 L. J. Ex. 321.

(5) 4 T. R. 206.

judgment the Court say (page 208): "The language of the bills of lading in this case leads to the conclusion that the exception of the fire is co-extensive with the contract to deliver and does not limit protection to the time during which the goods are in the ship. The landing of the goods appears to us to have been in conformity with the custom of the port and without default on the part of the master. For these reasons we affirm the decree with costs."

The exceptions in the bill of lading in the present case are: "The act of God, the Queen's enemies, restraint of princes or rulers, pirates, or robbers by sea or land, accident, loss and damage from vermin, barratry, jettison, collision, fire, accidents to, or defects latent or otherwise in hull, tackle, boilers, or machinery, or their appurtenances, steam, and all the perils, dangers, and accidents of the sea, rivers, land carriage and steam navigation, of whatsoever nature and kind, and accidents, loss, or damage from any act, neglect, or default whatsoever of the pilot, master, or mariners, or other servants of the company, or from any deviation excepted." It is said that as the exception as to "acts of servants" of the company comes in the bill of lading after the exception of "perils of the sea," it must have been intended to apply only to acts after the voyage had commenced. The Chief Judge relies on the conclusion come to in *Steel vs. The State Line Steamship Company*⁽¹⁾, that the acts contemplated by the bill of lading were subject to the sailing of the ship; but the language of that bill of lading was very exceptional and pointed clearly to all the exceptions being so restricted. The exceptions in the present case are, on the contrary, of the most comprehensive kind, and clearly comprehend occurrences which might happen immediately after the sugar had been delivered over to the shipowners. There seems, therefore, to be no sufficient reason for holding that the exception in general terms against the negligence and default of the pilot, mariners, or other servants of the company should be restricted to the voyage, simply because it is found at the close of the bill of lading. It is entirely independent of the provision against the perils of the seas, and indeed separated from it by a semicolon. And we may here observe that the exception as to acts of pilots and mariners in *Hayn vs. Culliford*⁽²⁾, which the Court said would have applied to negligent stowage had agents and servants been included in it, is

1888.

HASSUMDHAI
VISRAM
vs.
BRITISH
INDIA STEAM
NAVIGATION
COMPANY.

(1) L. R. 3 App. Cas. 72.

(2) L. R. 4 C. P. D. 182.

1888.

HASSUMBHAI
VISRAM
ES.
BRITISH
INDIA STEAM
NAVIGATION
COMPANY.

found at the end of the bill of lading after "perils of the seas." If after the plaintiffs' goods had been shipped at Rangoon and during the three days that the steamer lay there before she left for Bombay, she had been run down on a dark night by another vessel as a steamer has before now been run down and sunk when at anchor in the harbour of Bombay (on the 15th November 1887, the day the "Byculla" left Rangoon, according to the Bombay almanack there was a new-moon), it would, we think, be most unreasonable to hold that the defendants were not entitled to rely on the word "collision" in the exemption clause. So if the steamer had during those three days been burnt, or been attacked and sunk by the Queen's enemies, or if the plaintiff's goods had suffered from "pirates or robbers by sea or land," why is the company not entitled to rely on the exceptions applied to such a state of things? The case of *The Hongkong and Shanghai Banking Corporation vs. Baker*⁽¹⁾ is, we think, one of high authority. It was argued in the Court of Appeal in December 1869 by the then Advocate General, Mr. Scoble, and Mr. M'Culloch for the plaintiff, and by Mr. Green and the present Advocate General for the respondent, the arguments extending over five days. Sir M. R. Westropp, C.J., delivered the decision of the Court in October 1870, and at page 207 of the report towards the close of a very careful and elaborate judgment said: "The reasonable mode of construing the contract contained in the bill of lading is to treat the exceptions as co-extensive with the liability."

We adopt a similar construction in regard to the bill of lading in the present case. Any other view would, in our opinion, be unreasonable and contrary to the intention of the parties as evidenced by the terms of the bill of lading itself. It was, no doubt, the duty of the defendants to supply a seaworthy steamer. In the present case the "Byculla" was, according to the facts stated by the Chief Judge, reasonably fit for the carriage of the plaintiffs' 1,306 bags of sugar from Rangoon to Bombay; but the master, mariners, or other servants of the defendants negligently put them in a part of the hold which was not dry, and 1,046 of the bags, from such improper stowage and also by the subsequent improper stowage of other wet logs of timber, became wetted and damaged.

For the above reasons we reply, in answer to the question referred

(1) 7 B. H. C. R. (A.C.J.) 186.

for the opinion of the High Court, that the defendants were protected from liability by the terms of their bill of lading, the damage complained of being in our opinion covered by the words "and accidents, loss or damage from any act, neglect, or default whatsoever of the pilot, master, or mariners or other servants of the company" excepted.

Inverarity applied for the costs of the reference.

SARGENT, C.J.—Section 620 of the Civil Procedure Code, we think, applies, and by that section the costs consequent on a reference are made "costs in the case". That being so, they must be left to the Judge of the Small Cause Court for him to deal with.

Attorneys for plaintiffs—*Hore, Conroy, and Brown.*

Attorneys for defendants—*Craigie, Lynch, and Owen.*

KHARSEDJI RUSTOMJI COLAH, EXECUTOR OF DOSSIBA'I,
WIDOW, PLAINTIFF, VERSUS PESTONJI CAWASJI BUCHA, DEFENDANT.*

Small Cause Court—Jurisdiction—Gift—Incomplete gift—Suit by executor to recover promissory notes on ground that the gift of them to defendant was incomplete—Act XV. of 1832, sec. 18.

The plaintiff as executor of D. sued the defendant in the Court of Small Causes to recover two Government promissory notes, of the nominal value of Rs. 2,000, standing in the name of D. The defendant, who had been D.'s servant, alleged that the notes had been given to him by D. as a reward for past services. The Court held that there was evidence (though unsatisfactory) of a gift by D. to the defendant. It was then contended, on behalf of the plaintiff, that assuming there was evidence of a gift, such gift was incomplete, inasmuch as the notes had not been endorsed to the defendant, and that the defendant was not entitled to any aid from the Court to perfect the gift. The Judge held that the Court had no power to decree the return of the notes or payment of their value, and that so far as the jurisdiction of that Court was concerned the defendant had a right to retain the notes.

Held by the High Court that the Court of Small Causes had jurisdiction to entertain the plaintiff's claim, on the ground that there was an incomplete gift of the notes to the defendant, and that it might on that ground pass a decree in favour of the plaintiff for the return of the notes or payment of the value.

CASE stated for the opinion of the High Court by Mr. Spencer, Acting Chief Judge, under section 69 of the Presidency Small Cause Courts Act (XV. of 1882).

* Reported at I. L. R., 12 Bom. 573.

1888.

HASSUMBHAI
VISRAM
VS.
BRITISH
INDIA STEAM
NAVIGATION
COMPANY.

1888.

Aug. 24.

1888.

KHARSEDJI
KUSTOMJI
COLAH

VS.

PESTONJI
CAWASJI
BUCHA.

1. This is a suit in trover brought by an executor to recover from the defendant two Government promissory notes of the nominal value of Rs. 2,000, standing in the name of the testatrix Dossibái.

2. The plaint alleges that for some years during the lifetime of the said Dossibái, and till her death, the defendant was employed as a cook, and during her last illness he had possession of her keys of the cupboards and boxes in her house. That during the said illness of Dossibái, on or about the 19th June 1886, the said defendant removed from her cash-box or cupboard two Government promissory notes of the value of Rs. 2,000, the property of the said Dossibái. The plaint goes on to state that the plaintiff, as the executor of the said Dossibái, had demanded the return of the notes, but that the defendant had refused to return them, and had set up a false claim to the same, alleging that he had received them by way of gift from Dossibái, and concludes with a prayer for judgment in the sum of Rs. 2,000, as the value of the said notes, or for the return thereof.

3. The defence was that these notes were given to the defendant on the 19th June 1886 by the plaintiff by direction of Dossibái as a reward for his past services. The evidence of the defendant on this point was so very unsatisfactory, that I could not rely upon it.

4. On the other hand, the plaintiff did not adduce any evidence to show that the defendant had removed the notes from Dossibái's box as in the plaint alleged; that was an inference which, it was assumed, the Court would draw from the fact of the defendant being in possession of the notes unendorsed; but the testimony of the plaintiff himself, his conduct, and the other circumstances, which I shall presently state, appeared to me to afford some evidence that the notes had been given to the defendant by Dossibái, though not in the manner deposed to by him.

5. The evidence of the plaintiff was to the following effect:—He stated that on the 19th of June 1886 he, by desire of Dossibái, opened the box which contained her securities, and made a list of them. This list was put in as an exhibit at the hearing, and it included the two promissory notes the subject of this suit. Dossibái, though feeble from age, was then in her usual health, and there was no reason to apprehend that her death would take place, as it did, on the 27th of June following. On the 27th June 1886, the plaintiff again opened the box, and made a second list of securities. On

that occasion the two notes were missing, and were at once produced by the defendant, who alleged that they had been given to him by Dossibái as a reward for his services. The plaintiff was the residuary legatee under Dossibái's will and would have been entitled to the notes on her death. He did not, however, immediately accuse the defendant of having obtained possession of the notes dishonestly; but what took place was this—the defendant, with the knowledge of the plaintiff, went across the road to the house of Dr. Edulji Nusserwanji, a graduate of the Grant Medical College, and a Justice of the Peace, who had been in the habit for years past of attesting Dossibái's mark, whenever she sold or drew interest on her securities, and left a message that the Doctor was wanted at Dossibái's house. On his return home, Dr. Edulji went to the house of Dossibái. Dr. Edulji's evidence both parties admit to be beyond impeachment, and is as follows:—‘On entering the room in which the lady was lying, I saw the plaintiff and his wife. I asked the plaintiff why I was wanted. He said the defendant wanted two Government promissory notes to be signed by the deceased and attested by me. In the meantime the defendant came in and produced two promissory notes. I began to examine the lady in the presence of the parties. I found her in an exhausted and insensible state, almost in a dying state. I therefore said to the plaintiff the lady was not in a fit state to do any business. No complaint was made to me that the notes had come into the hands of the defendant by improper means. No complaint of any sort was made to me. No complaint was made that the defendant had got the notes without the knowledge of the deceased or of the plaintiff. When I said deceased was not in a fit state to transfer the notes, the defendant spoke to the plaintiff, and said that he, plaintiff, was aware of the intention of the deceased to give him those notes, or words to that effect; whereupon the plaintiff said, if he could get the lady to transfer the notes he might do so. Dossibái died on the same day, and the notes were allowed to remain in the possession of the defendant. It was not until the 27th of July 1886, one month after, that the plaintiff by an attorney's letter demanded the return of the notes and for the first time charged the defendant with having abstracted them from his mistress's box without the consent or authority of his mistress.’

1888.

KHARSEDJI
RUSTOMJI
COLAH
vs.
PESTONJI
CAWANJI
BUCHA.

1888.

KHARSEDJI
RUSTOMJI
COLAH
vs.
PESTONJI
CAWASJI
BUCHA.

6. On the facts as above set forth, namely, that the plaintiff, who would have been entitled to those notes on the death of Dossibái, did not, when they were produced by the defendant on the 27th of June, charge him with having fraudulently obtained possession of them, but acquiesced in Mr. Edulji being called to attest Dossibái's transfer of the notes to the defendant, and further, had allowed the notes to remain in his possession, and did not accuse him of fraud until a month afterwards, I held that there was evidence of a gift of the notes to the defendant.

7. It was then contended that, assuming there was evidence of a gift, the gift was incomplete, inasmuch as the notes had not been endorsed to the defendant, and he was not entitled to any aid from the Court to perfect the gift. I held that this Court had no power to declare that the gift was incomplete, and on that ground to decree the return of the notes, or payment of their value, and that, so far as the jurisdiction of this Court was concerned, the defendant had a right to retain the notes.

8. I therefore dismissed the suit subject to the opinion of the High Court on the following question, which I have been asked to state on behalf of the plaintiff:

Assuming that there was evidence of a gift, had this Court jurisdiction to pass a decree in favour of the plaintiff for the return of the notes or payment of their value, on the ground that the gift was incomplete?

Latham (Advocate General) for plaintiff.

Jardine and *Viccaji* for defendant.

The following authorities were cited: *Rummen* vs. *Hare*; ⁽¹⁾ *In re Richardson*, *Shillito* vs. *Hobson*; ⁽²⁾ *Barton* vs. *Gainer*; ⁽³⁾ *In re Hancock*, *Hancock* vs. *Berrey*; ⁽⁴⁾ *Bái Jadháv* vs. *Tribhuvandás Jagjivandás*. ⁽⁵⁾

JUDGMENT OF THE HIGH COURT (Sargent, C.J., and Scott, J.)

This reference arises out of a suit by an executor in the Small Cause Court to recover from the defendant two Government notes,

(1) L. R. 1 Ex. Div. 169.

(2) L. R. 30 Ch. Div. 396.

(3) 3 H. & N. 387.

(4) 36 W. R. 710.

(5) *Ante* page 12 and 9 Bom. H. C. R. 333.

of the nominal value of Rs. 2000, standing in the name of the testatrix, alleging that the defendant had removed them from the testatrix's box during her illness. The defence set up was that the notes had been given by the testatrix to the defendant as a reward for past services. The Judge of the Small Cause Court says that the defendant's evidence on this point was very unsatisfactory, and that he could not rely on it. However, he held, upon the whole of the evidence, that there was evidence of a gift of the notes to the defendant, but being of opinion, as it would seem, that he had not jurisdiction to go into the question whether there had been an incomplete gift of the moneys represented by the notes, he held, on the authority of *Barton vs. Gainer*⁽¹⁾ and *Rummens vs. Hare*⁽²⁾ that the defendant had the right to retain the notes.

Those cases are, doubtless, decisions, that where there is evidence of a gift to the defendant of the paper writing constituting the security, an action of detinue will not lie at common law in England for the recovery of such paper writing, on the ground that there is an imperfect gift of the moneys which are the subject of the security. In such actions at common law, as Lord Cairns points out in *Rummens vs. Hare*,⁽²⁾ there is no question with regard to the money secured by the paper writing, but for the detention of the paper writing only. However, in a Court of Equity, the question is regarded from a wider point of view. In *Searle vs. Law*⁽³⁾ the plaintiff, who was the holder under an incomplete voluntary assignment of turnpike securities and shares, sought for a declaration that he was beneficially entitled to them, and the Court having found that he was not so entitled, ordered him to deliver them up. Again, in *In re Richardson, Shillito vs. Hobson*,⁽⁴⁾ it was held that the defendant could not retain possession of a title-deed which had been given to him, as it could not be separated from the equitable mortgage created by its deposit, of which there had been no valid and complete gift to the defendant. Lastly, in *In re Hancock, Hancock vs. Berrey*,⁽⁵⁾ a mortgagee of a share in a certain sum of consols delivered

1888.

KHARSEDJI
RUSTOMJI
COLAH
VS.
PESTONJI
CAWASJI
BUCHA.

(1) H. & N. 387.

(2) L. R. 1 Ex. Div. 169.

(3) 15 Sim. 95.

(4) L. R. 30 Ch. Div. 396.

(5) 36 W. R. 710.

1888.

KHARSEDJI
RUSTOMJI
COLAH
vs.
PESTONJI
CAWASJI
BUCHA.

the mortgage-deed to a third person intending to make a gift of the mortgage, which was not completed, the Court directed the defendant to restore the deed to the representative of the mortgagee.

In the first two of these cases in equity there were special circumstances which may prevent their being regarded as authorities for holding that a Court of Equity will, in all cases of an incomplete gift, direct documents of title to be handed over to the person beneficially entitled to them. The last decision, however, cannot well be supported on any other ground. Nor is it possible to draw any real distinction between a mortgage-deed in that case and the Government promissory notes in the present one. They are both the documents of title upon which the creditor must rely to enforce his claim in the one case against his mortgagor and in the other against Government. We think, therefore, that the plaintiff, in a Court competent to deal with all the rights of the parties, ought to succeed if there was no complete gift of the moneys secured by the notes.

It was argued, however, that a Court of Small Causes cannot deal with the question in its entirety, as to do so would be virtually to declare the defendant to be a trustee for the plaintiff, thus making a declaratory decree, which is excluded from the competency of the Court by section 19, sub-clause (s), of Act XV. of 1882. But that clause refers to a declaratory decree properly so called and not to one in which the declaration is merely introductory to the relief sought. Again, it was contended that the jurisdiction of the Small Cause Court is confined to suits where the right sought to be enforced would have been the subject of a suit on the Plea Side of the Supreme Court. The jurisdiction of the Small Cause Court under the Acts IX. of 1850 and XXVI. of 1864, was doubtless held to be so limited (except as specially provided by section 32), in *Bái Jadháv vs. Tribhuvandás Jagjivandás*.⁽¹⁾ That conclusion was arrived at on the language of section 25 of the Act of 1850, which gives jurisdiction to the Small Cause Court in suits where the debt or damage claimed or value of the property in dispute is not more than Rs. 500. The language of section 2 of Act XXVI. of 1864 was more com-

(1) *Ante* page 12 and 9 Bom, H. C. Rep. 333.

prehensive, but the Court, notwithstanding, held that the object of the Legislature in passing Act XXVI. of 1864 was to increase the money limits of the jurisdiction of the Court, not to enlarge the class of suits on which it had jurisdiction. The language, however, of section 18 of Act XV. of 1882, which now determines the jurisdiction of the Small Cause Courts, is quite general, and gives jurisdiction to the Courts to try "all suits of a civil nature" when the amount or value of the subject-matter does not exceed Rs. 2000, subject only to the exceptions in section 19, none of which have any application to the present case, which raises only the question whether there has been an incomplete gift of the moneys secured by the notices. We have, therefore, no doubt that the Court of Small Causes has jurisdiction to entertain the plaintiff's claim on the ground that there was an incomplete gift, and must answer the question referred to us in the affirmative.

Attorneys for plaintiff—*Wadia* and *Ghandy*.

Attorneys for defendant—*Ardesir*, *Hormusji*, and *Dinsha*.

ANUPCHAND HEMCHAND, PLAINTIFF, versus CHAMPSI
UGERCHAND, DEFENDANT.*

1888.
Aug. 24.

Evidence—Evidence Act I. of 1872, section 92, proviso 1—Contract—Wagering contract—Bombay Act III. of 1865—Oral evidence admissible to prove a contract to be a gaming transaction.

In an action on a contract for the purchase and sale of goods on a certain day, the defendant pleaded that the contract was a wagering contract, that the parties never intended to give or take delivery of the cotton, and that the contract was, therefore, void.

Held, that oral evidence was admissible to prove the defence set up by the defendant.

CASE stated for the opinion of the High Court by Mr. Spencer, Acting Chief Judge, under section 69 of the Presidency Small Cause Courts Act XV. of 1882.

1. This is a suit brought to recover from the defendant the sum of Rs. 543-6-0 under the following circumstances.

* Reported at I. L. R. 12 Bom. 585.

1838.
KHARSEDJI
RUSTOMJI
COLAH
vs.
PESTONJI
CAWASJI
BUTHA.

1888.

ANUPCHAND
HEMCHAND
vs.
CHAMPSI
UGERCHAND.

2. On the 2nd of November 1886, the defendant by an agreement in writing made through a broker, copy translation of which is marked (A),* contracted to sell to the plaintiff fifty full-pressed bales Broach-ginned good class cotton of the crop of the Samvat year 1943 at the price of Rs. 204-8-0 *per khandi* deliverable between the 15th and 25th of March 1887. A counterpart of (A), signed by the plaintiff, was given to the broker who negotiated the contract for delivery to the defendant and was produced by his counsel at the hearing.

3. The plaintiff in his evidence stated that the price of the above description of cotton continued to rise after the contract was made, and that some days after the time for delivery one Wastarām called on him on behalf of the defendant and stated that the defendant's cotton was not likely to arrive in time and asked him to settle contract (A) at the bazar rate.

The plaintiff expressed his willingness to do so through a broker, and on the 18th March 1887 he agreed, through a broker, Lalu Dongar, to settle the difference in price at Rs. 227-8-0 *per khandi*. The broker thereupon brought him an agreement signed by the defendant, whereby he contracted to purchase from the plaintiff the same quantity and description of cotton deliverable on the same dates at Rs. 227-8-0 *per khandi*. Copy translation of the agreement is annexed and marked (B).†

A counterpart of this second agreement signed by the plaintiff was delivered to the defendant by the broker and was produced by the defendant's counsel at the hearing. The plaintiff further

* (Contract (A).)—To Sa Motilal Sakulchand, written by Sa Karumchand Chapsi. To wit: I have agreed to deliver to you fifty *paki* (i.e. full-pressed) bales of new Broach-ginned good class cotton of the crop of the Samvat year 1943. The price thereof is at the rate of Rs. 204½ *per khandi* less 5½ *per cent.* rebate. As to the fixed time (for delivery) thereof, it is to be duly delivered in full from the 15th March 1887 up to the 25th March. Through the broker Sa Ratanchand Savaichand. The 2nd November 1886. The 6th Kartuk Sud, 1843.

† (Contract (B).)—To Sa Motilal Sakulchand, written by Sa Karamchand Chapsi. To wit: I have agreed to purchase from you fifty *paki* (full-pressed) bales of new Broach-ginned good class cotton of the crop of the Samvat year 1943. The price thereof is at the rate of Rs. 227½ *per khandi* less 5½ *per cent.* rebate. As to the fixed time for delivery thereof I am duly to receive the same in full from the 15th day of March 1887 up to the 25th day of March. Through the broker Lalluchand Dongersi. Samvat 1943, 9th Falgun Vud, Friday, 18th March 1887.

stated that if he had not been asked to settle contract (A), he would have insisted on the cotton being delivered at due date. The plaintiff by his summons claimed the difference between the two rates of Rs. 204-8-0 and Rs. 227-8-0 per khandi, at which he had agreed to buy and sell the cotton.

4. No evidence was called on behalf of the defendant to contradict the evidence of the plaintiff, but it was contended by his counsel (1) that agreement (A) was a wagering contract, that parties never did intend to give or take delivery of cotton, but to pay the difference in price, and that it was, therefore, void under section 30 of the Indian Contract Act, and (2) that there was no evidence that the defendant had agreed to pay the damages claimed, agreement (B) being unambiguous in its terms and oral evidence not being admissible to connect it with agreement (A).

5. For the reasons given in my judgment and on the authority of the case there cited, *Juggernath Sewbux vs. Ram Dayal*,⁽¹⁾ I refused to admit oral evidence which was tendered to show that agreement (A) was intended to be a wagering contract, and I also held there was evidence that the defendant had agreed to pay to plaintiff the difference between the rates in agreements (A) and (B).

6. I therefore gave judgment for the plaintiff, but on the application of the defendant's counsel that judgment is contingent on the opinion of the High Court on the following questions :

First, was oral evidence admissible for the purpose of showing that agreement (A) was a contract by way of wager?

Second, was oral evidence admissible for the purpose of showing that agreement (B) was intended to operate by way of a settlement of the damages which would become due to the plaintiff by the non-fulfilment of the first agreement?

7. If the High Court should be of opinion that I was in error in refusing to take evidence on the first point, I request that the case may be remitted to this Court for the purpose of taking such evidence.

No appearance for plaintiff.

Telang for defendant.

1888.

ANUPCHAND
HEMCHAND
vs.
CHAMPSEI
UGERCHAND.

(1) I. L. R. 9 Calc. 791.

1888.

ANUPCHAND
HEMCHAND
vs.
CHAMPST
UGERCHAND.

JUDGMENT OF THE HIGH COURT (Sargent, C.J., and Scott, J.)

The first question referred to us is whether oral evidence is admissible to prove that a contract for the purchase and sale of goods deliverable on a certain day was in reality a gaming transaction, on the ground that neither party intended there should be an actual buyer and seller, but only that the difference between the price when the bargain was made and the price at the time fixed for delivery should be paid by one or other of the parties. By Bombay Act III. of 1865, all contracts whether by speaking, writing, or otherwise knowingly made to further or assist the entering into, effecting, or carrying out agreements by way of gaming or wagering shall be null and void. Now a contract in terms for the sale and delivery of goods at a certain time, but upon the understanding that it is not to be carried out, and only the differences of the prices paid, is a wagering contract, or, as Mr. Justice Lindley said in *Thacker vs. Hardy*,⁽¹⁾ "a time-bargain, in the sense of an unenforceable bargain." It is true that such a transaction is not declared by the Act to be illegal, but the existence of such "understanding" between the parties, or, in other words, of such an intention on their part is a fact within the interpretation clause of the Evidence Act, illustration (d); and as it would invalidate the contract by making it "null and void," might be proved under section 92, proviso 1, of that Act, which provides that any fact (as interpreted by section 3) may be proved which would invalidate the document. The case of *Doe dem. Chandler vs. Ford*,⁽²⁾ is an illustration of this rule. There evidence was allowed to be given by the defendant that the annual value of the property on which an unregistered annuity was charged was less than the annuity, although there was a covenant by defendant in the annuity deed that the property was of equal value; the object being to show that the annuity was null and void for want of registration under Act 53 Geo. III. c. 141. In *Grizewood vs. Blane*,⁽³⁾ where two contracts in form for the sale and purchase of shares in certain railway companies to be delivered by a certain date were declared on, evidence was admitted in order to prove that the transaction amounted to gambling; that at the time of entering into the contracts neither party meant to sell or purchase the shares;

(1) 4 Q. B. Div. at page 689.

(2) 3 Ad. & Ell. 649.

(3) 11 C. B. 526.

and in *Thacker vs. Hardy*,⁽¹⁾ where the case was much discussed, no doubt was thrown on the admissibility of such evidence, although the Court thought that the jury were probably wrong in their conclusion. Lastly, in *Maganbhai Hemchand vs. Manchabhai Kallianchand*,⁽⁴⁾ where the contract was in force for the sale of a share in the Mazagon Company, the case was remanded by the Court of Appeal for trial on the issue, "whether the contract was a wagering one" with liberty to both parties to produce evidence. The effect of proviso 1 to section 92 does not appear to have been considered, at any rate from the above point of view, in *Juggernath Sewbux vs. Rám Dayal*.⁽³⁾ We must, therefore, answer the first question in the affirmative, and remand the case to the Small Cause Court for the purpose of taking evidence.

Attorney for defendant—*E. Wilkin*.

1868.
ANUPCHAND
HEMCHAND
vs.
CHAMPSI
UGERCHAND.

DWARKADA'S UDHAVJI, PLAINTIFF, versus BAPTY BROTHERS,
LIMITED, DEFENDANTS.

1888.
Sept. 22.

Master and servant—Breach of condition by servant—Agreement to devote whole time to employer's business—Auditing accounts for third parties out of office hours.

Plaintiff was employed as a manager to defendant's company on condition that he was to devote his whole time to his employers' business, except that he might act as an auditor to certain companies mentioned in the agreement. Plaintiff audited the accounts of a company not specified in the agreement, and was dismissed. He was also charged with negligence and incompetence.

Held, that the charge of negligence and incompetence was not proved; but that plaintiff had committed a breach of his agreement in auditing the accounts of a company other than those mentioned, and was rightly dismissed.

CASE stated for the opinion of the High Court under section 69 of Act XV. of 1882, by N. Spencer, Acting Chief Judge.

1. The plaintiff in this suit sought to recover from the defendants the sum of Rs. 2,000, being rupees two hundred as salary for January 1887, and the balance as damages for wrongful dismissal.

2. By a resolution passed by the Board of Directors of the defendant-company at a meeting held on the 1st of April 1886, the plaintiff was appointed manager or assistant manager of the com-

(1) L. R. 4 Q. B. D. 685.

(2) 3 Bom. H. C. R. 79 O.C.J.

(3) I. L. R. 9 Calc. 791.

1888.

DWARKADÁS

UDHAVJI

vs.

BAPT
BROTHERS.

pany on a salary of Rs. 200 per mensem, for a term of two years on the conditions mentioned in the said resolution.

3. On the 13th of January 1887, the plaintiff was suspended from duty, and on the 21st January he was dismissed from employment by the shareholders of the company. No reason was at that time assigned for his dismissal, but by a letter dated the 8th of February 1887, the Directors alleged as a justification for the dismissal, that the plaintiff had been guilty of a breach of the terms of his engagement in having in the month of June previously audited the accounts of the Mechanics' Building Company.

4. The plaintiff was to devote the whole of his time to the company's business except that he might act as auditor to the companies therein mentioned, and also work for a short time for the purpose of winding up the business in which he was then engaged, and it was provided that in the event of any breach of this agreement or misconduct the company were at liberty to terminate the engagement.

5. The plaintiff never was appointed auditor to either of the two last companies.

6. When the plaintiff was appointed auditor of the Mechanics' Building Company he did not apply to the Directors of the defendant-company for permission to undertake the duties, but the fact that he had done so was known to one of the Directors of the defendant-company, who was also a Director of the Mechanics' Building Company. The late chairman of the Directors in his evidence in Court stated that permission would have been granted by the Board if asked. The work of auditing the accounts occupied the plaintiff three days and was done out of office hours.

7. For the defendants it was contended that they were justified in dismissing the plaintiff on the ground (1) that the plaintiff was habitually negligent and incompetent to perform the duties for which he was engaged, and (2) that the plaintiff was guilty of a breach of his agreement in undertaking the audit of the accounts of the Mechanics' Building Company.

8. On behalf of the plaintiff the charges of habitual negligence and incompetency were denied, and it was argued that the auditing of the accounts of the Mechanics' Building Company, which occupied only a short time and was done after office hours and had caused

no damage to the defendants, was not such a breach of the terms of the plaintiff's engagement as would justify the defendants in summarily dismissing him.

9. The charges of habitual negligence and incompetency were not proved. It was not proved that any damage had resulted to the defendant-company by the plaintiff's action in auditing the books; but I held that the plaintiff had committed a breach of his agreement in auditing the accounts of the Mechanics' Building, and that the defendants were, therefore, justified in dismissing him. I allowed the plaintiff his wages for January 1887, but disallowed the entire claim for damages.

10. At the request of the plaintiff my judgment was given contingent on the opinion of the High Court on the following question :

Did the plaintiff commit a breach of his agreement in auditing the accounts of the Mechanics' Building Company without obtaining sanction of the Directors of the defendant-company, and was such breach a justification for dismissing him before the expiration of the term of his agreement ?

Should their Lordships be of opinion that the plaintiff was wrongfully dismissed and is entitled to damages, I assess those damages at Rs. 800 beyond the sum of Rs. 200 awarded to him as salary for January.

JUDGMENT OF THE HIGH COURT—(Sir C. Sargent, C.J., and Scott, J.)

The question should be answered in the affirmative.

VOLKART BROTHERS AND OTHERS, PLAINTIFFS, VERSUS NUSSER-WANJI JEHangIR KHUMBATTA, DEFENDANT.*

Demurrage—Sale of cargo by consignee—Several purchasers—Contract incorporating the charter-party—Liability of one purchaser for delay of all—Contract absolute.

On the 2nd June 1888, the defendant entered into two contracts with the plaintiffs, the consignees of the cargo, each for the purchase of 500 tons of coal per s. s. "Dunedin" then in harbour. The contracts provided (*inter alia*) delivery to be taken at a rate not less than 200 tons per day. All conditions in the charter-party

* Reported at I. L. R. 13 Bom. 392.

1888.

DWARKADÁS
UDHAVJI
vs.
BAPT
BROTHERS.

1889.

April 26.

1888.

VOLKART
BROTHERS
vs.
NUSSEERWANJI
JEHANGIR.

to be binding on the purchaser. The charter-party stated : " Cargo to be discharged, *weather permitting*, at the average rate of not less than 300 tons a working day, or to pay demurrage at the rate of £30 per working day or *pro rata*." Previously to the 2nd of June, the rest of the cargo had been sold by the plaintiffs to three other purchasers and the lay days had already partially expired, but as regards neither of these facts did the defendant ask or was he given information. The "Dunedin" discharged at only three of her four hatches, and so discharging was able to give delivery of something more than 300, but less than 400 tons a day. Delivery was given to whichever of the four purchasers was the first to come alongside. At the expiration of the lay days (being the days required to discharge the whole cargo at the average rate of 300 tons a day) the cargo had been completely discharged with the exception of 264 tons which remained to be delivered to the defendant. The cargo to be discharged subsequently to the 2nd of June would have been discharged within the lay days, but for the want of lighters on the part of the purchasers of the cargo generally. It occasionally happened, however, that a lighter was kept idle waiting for its turn at one of the three hatches. The plaintiffs paid one day's demurrage in respect of the delay in discharging the 264 tons, and now brought an action to recover the same from the defendant.

Held, that the defendant was liable. The contract of the defendant (by incorporation of the charter-party) to take delivery within the lay days, or to pay demurrage, being absolute, he could only excuse non-performance of his contract by showing it was due either to default of the captain of the ship or of the plaintiffs themselves, neither of which had been shown.

The plaintiffs were not to blame for any difficulties occurring by reason of there being other purchasers. That was the well-known nature of the trade, and it was for the defendant, if he desired protection in this respect, to provide for it in his contract.

Neither were the plaintiffs bound to be able to deliver to the defendant at the rate of 400 tons a day under his two contracts. The stipulation in each of the two contracts that delivery should be taken at a rate of not less than 200 tons *per diem*, was not one on which the defendant could insist, but was an independent stipulation in favour of the owners of the cargo.

CASE stated for the opinion of the High Court by W. E. Hart, Chief Judge.

1. The following extracts from my judgment on the rule for a new trial briefly set forth the facts admitted or proved. I respectfully submit the case for the opinion of the Honourable the Judges of the High Court on the following questions submitted to me by the defendant :

(a) Whether the Chief Judge of the Small Cause Court was right in holding that the defendant was bound to take delivery under his contracts with plaintiffs at the rate of 400 tons per day from the 4th June?

(b) Whether the plaintiffs were bound to see that four hatches were open for working and were worked?

(c) Whether the plaintiffs were bound to be ready and willing to deliver at least 400 tons per day?

(d) Whether the plaintiffs are not liable for the delay and the consequent demurrage occasioned by the plaintiffs having sold other portions of the cargo to persons other than the defendant?

(e) Whether the fact that a written notice of the commencement of the lay days had been waived by plaintiffs affected the contracts between the plaintiffs and defendant?

(f) Whether the said Judge was right in passing a decree for plaintiffs for one day's demurrage?

2. The plaintiffs were the consignees of a cargo of 2,519 tons of coal on board the steamer "Dunedin" which arrived in Bombay harbour on the 29th May 1888 under a charter-party dated 28th March 1888.

3. The charter-party provided for delivery as directed by the consignees to whom twenty-four hours' written notice was to be given of the vessel being ready to discharge, and the cargo to be discharged *weather permitting* at the average rate of not less than 300 tons a working day, or to pay demurrage at the rate of £30 per working day or *pro ratâ*.

4. No written notice of the arrival of the steamer was given to the plaintiffs. But the captain called at their office about noon of the 30th May and verbally informed them that the steamer was ready to begin unloading, and the plaintiffs admit that they accepted such verbal notice as sufficient.

5. On the 31st May the captain of the steamer "Dunedin" published in the English daily newspapers in Bombay the following advertisement: "Warning to consignees. A full cargo of coal shipped by Messrs. Hickie, Borman, and Company, London, per steamer 'Dunedin' arrived yesterday from Cardiff. Steamer is now ready to discharge and her time for doing so will commence to-day. Apply to Captain Cumming, care of James Mackintosh and Company."

6. No coal was discharged on the 31st May. On the 1st June 192 tons were discharged and on the 2nd June 319 tons.

7. On the 2nd June the defendant entered into two contracts with the plaintiffs each for the purchase of 500 tons of coal per steamer "Dunedin" in harbour, and each providing delivery to be taken at a rate of not less than 200 tons per day, all conditions in the charter-party to be binding on the purchaser.

1888.

VOLKART
BROTHERS
ES.
NUSSEFWANJI
JEHANGIR.

1888.

VOLKART
BROTHERS
vs.
NUSSEERWANJI
JEHANGIR.

8. The rest of the coal was sold on the same terms but in smaller quantities to three other purchasers. But the defendant was not expressly informed of this by the plaintiffs at the time he entered into his contracts with them.

9. On the day on which the defendant entered into his contracts with the plaintiffs, the 2nd June (a Saturday), he received a notice from plaintiffs to begin taking delivery of his coal on Monday the 4th June. He did so, and continued, together with the three other purchasers, to take delivery until the evening of Saturday the 9th June, by which time the others had received the whole of their respective lots, but there remained 264 tons of the defendant's coal undelivered.

10. During the whole time that delivery was being given to all four purchasers, the "Dunedin" was lying in the stream discharging her cargo into the purchasers' lighters alongside. In so doing she never worked more than three of her four hatches, nor had on board more than three gangs of coolies to handle the coal, nor more than three scales with which to weigh it into the purchasers' lighters.

11. As there were four persons to take delivery and only three hatches at which it was given, the rule followed in giving delivery at each hatch was "First come first served." It thus occasionally happened that a lighter was kept idle waiting for its turn at one of the three working hatches, but no appreciable delay was ever caused to any of them by the weather.

12. After all the cargo had been discharged except the last 264 tons of the defendant's coal, the "Dunedin" was moved into the Prince's Dock and laid alongside the quay. In this position she could not discharge into the defendant's lighters from more than two hatches, viz., those on the side further away from the quay against which she was lying.

13. By special arrangement between the plaintiffs' manager, the defendant, and the captain of the steamer the work of unloading was carried on during Sunday the 10th June. But only 198 tons were discharged on that day, the remainder of the cargo (66 tons) was delivered on the following day, and the ship was fully discharged at 3-30 P.M. on Monday the 11th June.

14. The captain of the steamer claimed to be entitled under the charter-party to two and a half days' demurrage from noon on

Saturday the 9th June, but ultimately agreed to forego one and a half days of this, and to accept one day's demurrage, £30, in full satisfaction of his claim.

15. This the plaintiffs paid to him and then brought this action to recover from the defendant under his contracts of 2nd June Rs. 446-8-0, as the equivalent of the said sum of £30, Rs. 90 as the charges incurred for the extra work done on Sunday the 10th June, and paid by the plaintiffs, but alleged to be payable by the defendant under the terms of the special arrangement abovementioned between him, the plaintiffs' manager, and the captain of the steamer; and Rs. 38-8-0 for dock charges, also paid by the plaintiffs but alleged to be payable by the defendant, thus making up altogether the sum of Rs. 575-0-2.

16. At the first hearing I held that the defendant had notice of the charter-party, and that the terms thereof were incorporated into his contracts with the plaintiffs whereby he had unreservedly bound himself to take delivery at the aggregate rate of 400 tons per day from Monday the 4th of June. I was therefore of opinion on the authority of *Straker vs. Kidd*⁽¹⁾ and *Porteus vs. Watney*,⁽²⁾ that the defendant would be liable for demurrage if he failed to take delivery at the stipulated rate, no matter what occasioned his default, provided the delay was not occasioned by any act or default of the plaintiffs or the ship.

17. But finding that the ship had not worked all her hatches, and that, in consequence thereof, she had not been ready and willing to give delivery to the defendant at the rate that he was bound to accept (400 tons per day) I dismissed the suit.

18. In so doing, I overlooked the fact that though the defendant by the terms of his contracts with the plaintiffs was bound to accept delivery if offered to him, at the rate of 400 tons per day, yet the ship, by the terms of the charter-party incorporated in those contracts, was under no obligation to deliver more than 300 tons per day.

19. On this ground Mr. Payne for the plaintiffs obtained a rule for re-hearing. In showing cause against that rule Mr. Hemming argued that the defendant, as assignee of the consignee, was not in the same position as the defendants in the two cases cited, and that

1888.

VOLKART
BROTHERS
VS.
NUSSEERWANJI
JEHANGIR.

(1) L. R. 3 Q. B. D. 223.

(2) L. R. 3 Q. B. D. 227 and on Appeal at page 534.

1888.

VOLKART
BROTHERS
vs.
NUSSEERWANJI
JEHANGIR,

those cases were, therefore, distinguishable from this. He further argued that by the defendant's contract with the plaintiffs, embodying the terms of the charter-party, the defendant was entitled to take advantage of all its benefits while accepting the burden of its obligation. Therefore he had the right to insist that the ship should have discharged at the average rate of 300 tons per day from the time that her lay days commenced under the charter-party. But he said that the lay days never had commenced and therefore there could be no demurrage, for want of the written notice to the consignees provided by the charter-party, which admittedly had never been given and which could not be waived by the consignees to the prejudice of their assignee. He further insisted that by the charter-party providing for the discharge of 300 tons only per day, which must be taken to be the full extent of the ship's powers of delivery, the plaintiffs by their several contracts with their four purchasers had bound the purchasers to accept, and therefore themselves to deliver 600 or 700 tons per day, a condition impossible of fulfilment, while the term in each of those contracts delivery to be taken at not less than 400 tons per day also meant that delivery was to be given at the same rate. Next, he urged that plaintiffs had been guilty of fraud in importing into their contracts with defendant the terms of the charter-party without giving him notice, (1) that they had waived the condition as to written notice, (2) that the lay days had commenced, (3) that they had sold to three other purchasers on similar contracts as to rate of acceptance, making a total of more than 600 tons per day, while the charter-party provided for delivery only at the rate of 300 tons per day, (4) that at the time of contracting with defendant they were themselves already in default under the charter-party, in not having taken delivery at an average rate of 300 tons per day. Lastly, he said the defendant was entitled also to its benefit, and should therefore be allowed eight and a half days from which the 11th June, being a Sunday, should be excluded, so that the steamer never was, in fact, on demurrage at all.

20. As regards the applicability of the two cases of *Straker vs. Kidd* and *Porteus vs. Walney*, I think the principle there enunciated must govern the present case, notwithstanding that the defendant is not the first consignee of the coal. Those cases show

that where a consignee unreservedly contracts to take delivery of his consignment within a certain time he is liable for the demurrage occasioned by his failure to do so, although the delay arises from causes beyond his control, provided it is not the result of any act or default on the part of the ship.

21. As to the rest of Mr. Hemming's argument, it seems to me to proceed principally on three fallacies; first, that the defendant is the plaintiff's assignee of rights under the charter-party; second; that there is a contradiction between the terms of the charter-party and of the defendant's contracts with plaintiffs of the 2nd June 1888, which prevents their being read together as one entire contract; third, that there was any obligation on the plaintiffs to disclose to the defendant at the time of their contract with him, either their then position with regard to the charter-party or their relations to other purchasers.

22. The defendant was not an assignee of the charter-party, but a purchaser from the plaintiffs of a part of their consignment under a contract which embodies, as against him, certain provisions of the charter-party. So read those provisions of the charter-party which might otherwise appear to be contradictory of the express terms of the defendant's contracts with the plaintiffs of 2nd June 1888 become quite consistent with them. The entire contract, then, though expressed in three documents, amounted to nothing more than one for the sale of 1000 tons of coal, with a provision that delivery is to be given at a rate of not more than 400 or less than 300 tons per day at the option of the vendors.

23. On this construction the defendant is not entitled to refer to any breach or waiver of the terms of the charter-party already complete before he entered into his contracts. By this contract he was to begin receiving 1000 tons of coal on the 4th June and was not entitled to insist on having delivered to him more than 300 tons per day on an average, but was obliged, if called on, to accept up to 400 tons per day and if he failed to do so was liable for demurrage at the rate of £30 per working day.

24. As to the fraud, it is not pretended there was any other than the constructive legal fraud to be imputed to the plaintiffs by reason of their silence on the four points I have mentioned. But before mere silence can be construed into fraud, it must be shown that

1888.

VOLKART
BROTHERS
vs.
NUSSEERWANJI
JEHANGIR.

1888.

VOLKART
BROTHERS
vs.
NUSSEERWANJI
JEHANGIR.

there was a duty to speak. Now, what obligation was there on the plaintiffs, expressly and unasked, to inform the defendant as to any one of those four points? By the terms of his contract he had notice of the charter-party and of the "Dunedin" being in harbour. He knew, moreover, that the unloading had already commenced and that he was himself the purchaser of a portion only of the cargo. He had thus been informed of quite enough to put him on enquiry if there were any points on which he required further information before binding himself. That he did not enquire, should be ascribed rather to the fact that he chose to act on his own judgment as a large dealer in coal of considerable experience, than to the presumption that he was misled by the silence of the plaintiffs on points as to which there does not seem to me any necessity that they should have spoken.

25. In these circumstances, I am still of the same opinion that I was when I first heard the case, that the principal point to be considered is, whether the plaintiffs, or the ship on their behalf, were ready and willing to give delivery at the rate agreed on. But that rate should be taken, I think, not at 400 tons per day (the rate which I originally took as the rate for delivery as well as for acceptance) but 300 tons per day, the rate for delivery provided by the charter-party and incorporated by reference into the contract.

26. Now, the evidence shows that though, as I found in the Court below, the ship was not ready and willing to deliver at the rate of 400 tons per day, yet she was ready and willing, though working three hatches only till moved into dock, and then only two, to deliver at an average rate of 300 tons per day from the time when the defendant began to take delivery on the 4th June, and that she did not in fact do so, was owing to the deficient supply of lighters by the purchasers during the earlier portion of the delivery.

27. But for the deficiency in the supply of lighters the ship could, from the 4th to the end of the 9th of June, have delivered 370 tons per day as required by the charter-party. But when she stopped work on the evening of the 9th June, there were, as a fact, only 264 tons left on board. So far as the ship then was concerned she was ready and willing to deliver at such an average rate in excess of the stipulated rate of 300 tons per day as would have

cleared the whole cargo out of the ship within the period of the lay days allowed by the charter-party which expired on Saturday the 9th June.

28. Now, it is beyond dispute that the defendant did not take delivery, not only at the rate of 400 tons per day stipulated in his contracts with the plaintiffs, but even at the less rate at which the ship was ready and willing to deliver.

29. Whether this was his fault or his misfortune, I think, on the authority of the two cases cited, matters not, in the face of his absolute unreserved undertaking.

30. The ship carrying 2,519 tons of coal to be discharged at the rate of 300 tons per working day had about $8\frac{1}{2}$ lay days under her charter-party. These commenced at noon on the 31st May, twenty-four hours after the verbal notice was given by the captain, which the plaintiffs accepted in lieu of written notice. The lay days would, therefore, expire on the evening of Saturday the 9th June, for we must exclude Sunday the 3rd as a non-working day. The ship therefore came on demurrage on Sunday the 10th June and so remained till 3-30 p.m. on Monday the 11th.

31. It is true that the charter-party provides that demurrage is only to be paid in respect of working days and ordinarily Sunday is not one. But by special agreement between the parties, Sunday the 10th of June was made a working day. Demurrage, therefore, can be claimed in respect of the Sunday as well as for the portion of Monday the 11th.

32. My former judgment on the first item of the claim and costs should be reversed and the plaintiffs should have judgment for the sum of Rs. 446-8-2, the equivalent of one day's demurrage, which is all that is claimed out of that found to have been incurred, together with costs on that sum, and Rs. 30 professional costs, and Rs. 30 professional costs of this rule.

Russell for defendant.

Starling for plaintiffs.

JUDGMENT OF THE HIGH COURT (Sir C. Sargent, C.J., and Scott, J.)

This reference from the Court of Small Causes arises out of a suit brought by the consignees of a cargo of 2,519 tons of

1888.

VOLKART
BROTHERS

vs.

NUSSEERVANJI
JEHANGIR.

1888.

VOLKART
BROTHERS
vs.
NUSSEEVANJI
JEHANGIR.

coal by the ship "Dunedin," to recover damages from the defendant for failure to take delivery of 1,000 tons of coal under two contracts dated the 2nd June 1888. Each of the contracts was for the purchase by the defendant of 500 tons of coal per steam ship "Dunedin" in harbour. The coal to be of the description known as "Inysfeied Cardiff," and to be delivered into the purchasers' boats alongside at Rs. 22½ per ton, delivery to be taken at a rate not less than 200 tons per diem. All conditions in the charter-party to be binding on the purchasers. One of the conditions of the charter-party was in the following terms: "The cargo to be discharged, weather permitting, at the average rate of not less than 300 tons a working day, or to pay demurrage at the rate of £30 per working day, or *pro rata*," except in certain cases which it is not necessary to mention. It is found by the case that the ship began to unload at midday of the 31st May and that the lay days terminated on the evening of Saturday the 9th June, by which time all the coal had been discharged excepting 264 tons of the coal purchased by defendant, which were discharged on Monday the 11th. The plaintiffs were obliged to pay £30 for that day's demurrage, and now claim it as damages from defendant for non-performance of his contract.

The provision in the contract of purchase that "all conditions in the charter-party or bill of lading are binding on the purchaser" incorporated those conditions into the contracts, and by so doing imposed the obligation on the defendant of removing his 1,000 tons of coal before the expiration of the lay days unless, indeed, he was prevented from doing so by default of the captain of the ship or of the plaintiffs themselves.

The case finds that there was no such default on the part of the ship, and that all the coal which was in the ship on the morning of the 4th June, when the defendant had notice from plaintiffs to take delivery, might have been discharged by the evening of the 9th if there had not been a deficiency of lighters.

Can it then be said to have been owing to the plaintiffs' default that the defendant failed to remove his coals by the evening of the 9th? It was scarcely contended that the plaintiffs could be held liable for any delay caused by the mere circumstance of there being other purchasers taking delivery of their

coals at the same time. This was the well-known nature of the trade, and the defendant's obligation to remove his coal before the expiration of the lay days was an absolute one. If they had wished to guard themselves against a possible difficulty arising from the above circumstance, they should have provided for it in their contract, as was pointed out by the Court in *Straker vs. Kidd*,⁽¹⁾ and *Porteus vs. Watney*,⁽²⁾ where the plaintiff was prevented from taking delivery of his goods by reason of their being beneath the goods of other holders of bills of lading.

The defendant, however, contends that the plaintiffs were in default as they were not able to deliver him 400 tons per diem, as it is alleged they were bound to do by the two contracts, and that, therefore, they cannot hold him liable for the delay which occurred in discharging the cargo. This must depend on the question whether upon the true construction of the contract, the stipulation "delivery to be taken at a rate of not less than 200 tons per diem" was one on which the defendant could insist, or was only in favour of the plaintiffs, and we think that looking at the circumstances under which contracts of this description are made in the coaling trade, the clause was an independent stipulation in favour of the owners of the cargo, and intended to give them the power of insisting, if they thought proper, on the coals being cleared out at the above rate *per diem*. As an illustration of such a distinction we may refer to *Neill vs. Whitworth*,⁽³⁾ where there was a clause, "that the cotton should be taken from the quay," which was held to be solely in favour of the vendors and not a condition precedent of the purchase.

Lastly, it was said that the plaintiffs should have informed the defendant when they entered into their contracts that only 511 tons had been taken delivery of on the 1st and 2nd June instead of 750 as contemplated by the charter-party. The finding, however, of the Judge, that all the coal might have been cleared out during the remaining lay days if there had been sufficient lighters makes it unnecessary to consider this question, as it is plain that the above circumstance did not in any way prevent the defendant

1888.

VOLKART
BROTHERS
vs.
NUSSERVANJI
JEHANGIR.

(1) L. R. 3 Q. B. D. 223.

(2) L. R. 3 Q. B. D. 227, on Appeal at p. 534.

(3) 18 C. B. N. S. 425.

1888.

VOLKART
BROTHERS
vs.
NUSSERVANJI
JEHANGIR.

from complying with his obligation to take delivery before the evening of the 9th. Lastly, the circumstance of the plaintiffs having waived a written notice of the commencement of the lay days could not affect the contracts between the plaintiffs and defendant. The plaintiffs could, of course, waive a written notice, and their doing so prior to the sale to the defendant was a matter in which the latter had no concern.

Questions (b), (c), (d), and (e) must, therefore, be answered in the negative and question (f) in the affirmative.

Plaintiffs to have their costs of this reference.

Attorneys for plaintiffs—*Payne, Gilbert, and Sayani*.

Attorneys for defendant—*Macfarlane, Edgelow, and Hemming*.

1889.

May 3.

THE IMPERIAL MANUFACTURING COMPANY, LIMITED,
PLAINTIFFS, versus MUNCHERSHAW BURJORJI WADIA, DEFENDANT.*

Indian Companies Act (VI. of 1882), section 45—Contract with the company—Signing duplicate of the subsequently registered memorandum—Subsequent allotment and repudiation—Specific Relief Act I. of 1877, sec. 23 cl. (h) and sec. 27 cl. (e).

The defendant in February 1886 signed duplicates of the documents subsequently registered as the memorandum and articles of association of the plaintiff-company in December of the same year. By the documents which he signed he agreed to take the number of shares (ten) set opposite his name. He never cancelled that agreement. Ten shares were subsequently allotted to him; but the defendant did nothing amounting to an acceptance of this allotment, and on the 19th April 1888 definitely cancelled his previous agreement to take shares.

Held, that the defendant had never become a shareholder of the company. Whatever the signing by the defendant of the documents in February 1886 amounted to, whether to a contract or to a mere proposal, the defendant in signing them addressed not the company, which was not then in existence, but the promoters. If a contract, the company was not then in existence, and could not therefore ratify it; if a proposal, it was not a proposal to the company or an agent for the company, and the company could not therefore accept it.

Section 23 clause (h) and section 27 (e) of the Specific Relief Act I. of 1877 do not apply to contracts to take shares, and only embody the English law as to cases where a company has taken the benefit of a contract, but refuses to carry it into effect.

CASE stated for the opinion of the High Court by W. E. Hart, Chief Judge.

1. This is a suit to recover Rs. 1,085-6 as the amount of two unpaid calls with interest, said to be due from the defendant as a registered holder of ten shares in the capital of the plaintiff-company.

2. His name appears at page 332 of the register of shareholders as the holder by allotment of the shares numbered from 232 to 241 registered in March 1887, the date being left blank.

3. Some time in February 1886, the defendant signed a clause at the end of a printed document purporting to be the proposed memorandum of association of a company then intended to be formed, whereby he agreed to take the number of shares (ten) set opposite his name.

4. At the same time he also signed a printed document purporting to be the articles of association of the intended company. These two documents together formed Exhibit (B) in the case.

5. The company was not registered until December 1886, and then it was not the documents so signed by the defendant that were registered as its memorandum and articles of association, but others, of which those signed by the defendant were said to be a duplicate or copy.

6. It was not contended that there was any material variance between the two sets of documents in their terms or conditions, and I found on the evidence that the defendant had not intimated to the plaintiffs or the promoters of the company before 19th April 1888 that he had cancelled his agreement to take the shares.

7. On the question as to the defendant's position in regard to the plaintiffs by reason of that agreement remaining uncanceled, it was admitted that the signature of the unregistered copy of the memorandum and articles not being equivalent to signature of the registered copy (see per Westropp, C.J., in *The Guzerat Spinning and Weaving Company vs. Girdhurlal Dulpatram*,⁽¹⁾ it could not be treated as an agreement with the company binding on the defendant.

8. But it was suggested that the defendant's agreement to take shares being communicated to the plaintiffs after the formation of the company, became his proposal to them, and that when they

1889,
THE
IMPERIAL
MANUFACTURING
COMPANY
vs.
MUNCHEK-
SHAW
BURJORJI
WADIA.

(1) I. L. R. 5 Bom. 425.

1889.

THE
IMPERIAL
MANUFACTURING
COMPANY
VS.
MUNSHAR-
SHAW
BURJORJI
WADIA.

accepted it and intimated such acceptance to him, it became an agreement with the company binding on the defendant under the latter portion of section 45 of the Indian Companies Act VI. of 1882.

9. A great part of the defence turned on the validity of the alleged acceptance by the plaintiffs and its communication to the defendant. But into that I did not go in deciding the case, as I was of opinion that the proposal came not from the defendant but from the plaintiffs, and that as they failed to prove its acceptance by him, they failed to establish their claim.

10. My reasons for such opinion are set forth in the annexed extract from my judgment, in which are also contained such further findings of fact as are necessary to the decision of the point.

11. The suit being for a sum exceeding Rs. 500, I have at the request of the plaintiff's counsel stated the case for the opinion of the High Court on the question of law whether my view as to the effect of the defendant's agreement in February 1886 is correct. If the answer to that question is in the affirmative my present decision will stand. If the answer be in the negative, my order dismissing the suit with costs must be set aside, and I apprehend I must proceed to decide the case on the points raised in the defence.

Extract from the judgment referred to :

It seems to me that the signature of Exhibit (B.) by the defendant constituted, not a mere offer or proposal to be communicated to some one else for acceptance, but a complete agreement with the promoter to take shares in his company when he should have formed it. Such an agreement under the late Indian Companies Act X. of 1866, section 22, or under section 23 of the English Companies Act, 1862, might possibly be argued to be capable of becoming an agreement with the company when formed ; for the words there are : " Every person who has agreed " (not specifying with whom) " to become a member of a company under this Act, and whose name is entered on the register of members," shall be deemed to be a member of the company. But this construction evidently did not recommend itself to the mind of the late Chief Justice in deciding the *The Guzerat Spinning and Weaving Company vs. Girdhurlal Dulpatram*.⁽¹⁾ The matter now, however, is beyond a doubt, for there is a material and significant difference in the wording of the present Indian Companies Act VI. of 1882, section 45, which says : " Every person who has agreed with a company under this Act (that is, with a company after it has been formed, registered, and commenced its existence as a company under the provisions of the Indian Companies Act, 1882,) to become a member &c." How a complete

(1) I. L. R. 5 Bom. 425.

agreement with a person is to be converted into an agreement with another, or modified into a proposal for an agreement with another, I confess I cannot see; still less can I understand how a man is to agree with a company under this Act on the basis of a proposal made to another at a time when under the Act the company could have no existence. Nor do I think the promoter can be regarded as the agent of the defendant authorized to convey his proposal to the company somewhat in the way that a broker for sale or purchase might be said to be; first, because that is not the form of the agreement with him as evidenced by Exhibit (B), and, secondly, because when Exhibit (B) was signed neither company nor shares were in existence. Nor do I see why the Court should trouble itself to be astute in elaborating ingenious and complicated theories in favour of the plaintiffs in regard to substituted agreements containing proposals and the like, under the latter portion of section 45 of the Indian Companies Act, when the plaintiffs had under the former portion of that section a very simple means themselves to bind the defendant by his agreement with the promoter by registering that copy of the memorandum and articles he signed, but chose not to avail themselves of it.

To my mind the simplest and most logical view to take of such a transaction as the present is this. The defendant by signing Exhibit (B) entered into a complete agreement with the promoter to take shares in the company when formed, assuming, of course, that they would be allotted to him by the directors. Such agreement, had that document been registered as the memorandum and articles of the company, would have become, by virtue of the former portion of section 45 of the Indian Companies Act, an agreement with the company, and they might then have sued upon it. But inasmuch as it was not so registered, it remained an agreement with the promoter, and cannot be regarded even as a proposal to the company capable of being converted by their mere acceptance into an agreement with them. When communicated to the company by the promoter, it is, in regard to them, simply a piece of information of the defendant's willingness to become a holder of ten shares. If the company thereupon proceed to allot him the shares, the proposal, in fact, comes from them. They will then have to show that it was communicated to the defendant and accepted by him.

The most that can be said, I think, is that the defendant's agreement with the promoter is to be regarded as an authority to the latter to convey the proposal involved in it to the company when formed. But to hold this would be to import into the agreement a term which it does not contain and not necessary to it. There is in it no suggestion of an authority to the promoter to do anything. It is simply an agreement that the defendant will take a certain number of shares. To do this, it is not necessary that the promoter should convey the proposal to the company when formed, or that he should have the defendant's authority to do so, for the proposal might equally well come from the defendant himself. If it does not, the consequence, no doubt, may be that the defendant is guilty of a breach of his agreement with the promoter. But for that he

1889.

THE
IMPERIAL
MANUFACTURING
COMPANY
vs.
MUNOHER-
SHAW
BURJORJI
WADIA.

1889.
 ———
 THE
 IMPERIAL
 MANUFACTURING
 COMPANY
 vs.
 MUNCHER-
 SHAW
 BURJORJI
 WADIA.

would be liable to the promoter, not to the company. It might be argued that it must have been the intention of the parties to the agreement in February 1886 that the promoter should communicate the defendant's proposal to the company when formed, inasmuch as that seems the simplest and most natural course. But to this the answer is much the same as before. If that was the intention it was easy to express it. That course is not on a mere speculation as to supposed unexpressed intention of the parties to introduce an additional term into their agreement which they did not themselves see fit to insert.

I know of no case in which it has been held that the signature before the formation of a company of an agreement to take shares at the foot of an unregistered copy of the intended memorandum and articles of association is a proposal to the company to take shares.

Finding as a fact that the defendant's agreement to take ten shares in the plaintiff's company when formed was a complete agreement with the promoter, and finding no evidence of any authority from the defendant to the promoter to communicate this agreement to the company when formed, as a proposal to them I hold it can no more be held a continuing proposal to, than a concluded agreement with, the company, on the simple ground that I find nothing in this case to take it out of the clear rule of law, that a mere agreement with one person cannot be afterwards taken advantage of by another who was not then so much as in existence, and I decline to be the first to give effect to a theory new to me, the effect of which seems to be to introduce a curious modification into, if it does not entirely revolutionize what I conceive to be settled law. This being so, the plaintiff's intimation to the defendant that they had allotted shares, which it is said they gave by several letters, must be regarded as a proposal from them that he should become a shareholder. The burden will then lie on the plaintiffs of proving that this proposal was accepted by the defendant.

The learned First Judge then considered the evidence bearing on this point and found that there had been no acceptance in fact by the defendant of such proposal.

Russell for plaintiffs.

Jardine for defendant.

JUDGMENT OF THE HIGH COURT (Sir C. Sargent, C.J., and Scott, J.).

This is a reference from the Chief Judge of the Small Cause Court arising out of a suit to recover Rs. 1,085-6 as the amount of two unpaid calls said to be due from the defendant as the registered holder of ten shares in the capital of the plaintiffs' company. It appears that the defendant in February 1886 signed duplicates of the documents subsequently registered as the memorandum and articles of association when the company was registered in December of the

same year. By the duplicate of the memorandum of association which he signed, he agreed to take the number of shares (ten) set opposite his name. He never cancelled that agreement. On the authority of *The Guzerat Spinning and Weaving Company vs. Girdhurlal Dulputram*,⁽¹⁾ it was admitted that the defendant's signature to such a document did not constitute him a member of the company under the former part of section 45 of the Indian Companies Act. But it was argued that the defendant's agreement with the promoters became on the registration of the company a proposal to the company to take shares which the company accepted by allotment. The only authority cited in favour of this view of the case was a remark made by the Court in *The Imperial Flour Mills Company, Limited, vs. W. T. Lamb*,⁽¹⁾ which was not necessary to the decision, and was only to the effect that even if such an agreement with the promoters could become equivalent to an application to the company, it had been withdrawn before acceptance by allotment. However, a consideration of the authorities *In re Empress Engineering Company*,⁽²⁾ *Melhado vs. Port Alegre Railway Company*,⁽³⁾ *Kelner vs. Barter*,⁽⁴⁾ *Scott vs. Lord Ebury*,⁽⁵⁾ shows that such a view of the case is inconsistent with the principle there laid down, and which may be stated in the following terms: "There cannot be an effective ratification of a contract by a person or a company not in existence at the time such contract was made." In the present case there was only a contract with the promoters. It has been decided that a promoter is not an agent for a company before its formation: *Sydney and Wigpool Iron Ore Company vs. Bird*,⁽⁶⁾ and this contract did not therefore bind the company and could not be held to be made on their behalf. Nor could it be ratified by the company, as the company was not in existence when it was made. I do not think the principle is altered by calling it an application. Whatever it was, whether contract or offer to take shares, it was addressed to the promoters and not to the company, and the company could not subsequently adopt it as they were not in existence when it was made, and it was not renewed when the company was established. It was argued that although ratification was not possible under

1889.

THE
IMPERIAL
MANUFACTURING
COMPANY
vs.
MUNCHER-
SHAW
BURJORJI
WADIA.

(1) I. L. R. 12 Bom. 647.

(2) L. R. 16 Ch. Div. 125.

(3) L. R. 9 C. P. 503.

(4) L. R. 2 C. P. 174.

(5) L. R. 2 C. P. 255.

(6) L. R. 33 Ch. Div. 85 at page 91.

1889.

THE
IMPERIAL
MANUFACTURING
COMPANY
vs.
MUNCHER-
SHAW
BURJORJI
WADIA.

English law, the Specific Relief Act (section 23 clause (h) and section 27 clause (e)) made it inadmissible. But these sections were not intended to apply to contracts to take shares, but only to contracts for the working purposes of the company such as would be, in the present case, a contract for the supply of machinery for making ice. They only crystallize the English law as to cases where the company has taken the benefit of a contract but refuses to carry it into full effect—see cases collected in Fry on Specific Performance (2nd Edition), Part 2, c. 5, and especially pages 228 and 229. Moreover, if these sections of the Specific Relief Act had been made to cover contracts regarding shares with promoters, section 45 of the Companies Act, which is a more recent enactment, could not have been framed in its present language. As the section stands, it could not be taken to include a contract made with the promoters. The addition of the words “with a company” in the Act of 1882 shows clearly that such contracts were not within the intention of the Legislature nor are they within the plain meaning of the words. We are of opinion, therefore, that the view taken by the Judge as to the effect of the defendant’s agreement in February 1886 is correct, and that he rightly disposed of the case by his order dismissing the suit with costs. The plaintiff must pay the costs of this reference.

Attorneys for plaintiff—*Bamanji and Hormasji.*

Attorneys for defendant—*Macfarlane, Edgelow, and Hemming.*

1889.

May 3.
June 21.

MAHOMEDALLY EBRAHIM PIRKHAN, PLAINTIFF, versus
SCHILLER, DOSOGNE, & COMPANY, DEFENDANTS.*

Principal and agent—Goods ordered through commission agents—Contract of agency—Contract of sale—Form of action.

The defendants traded in Bombay as merchants and commission agents under the style of S. D. & Co., being a branch of a French firm trading in Paris under the same name, of which firm also the defendants were members. The Paris firm were agents for certain manufacturers of zinc. The plaintiff, a Bombay merchant, ordered out forty-eight casks of zinc sheets through the defendants’ firm in Bombay by an indent in the following form: “I hereby request you to instruct your agents to purchase for me (if possible) the undermentioned goods on my account and risk upon the terms stated below.” Such terms *inter alia* limited the price of the goods and the time

* Reported at I. L. R. 13 Bom. 470,

within which the shipments were to be made. Later the plaintiff consented to increase his limit of price. The defendants having communicated with their Paris firm wrote to the plaintiff as follows: "We have the pleasure to inform you that our Home firm has reported by wire concerning your esteemed order as follows: 'Placed at your increased limit.'" Subsequently the plaintiff was informed by the defendants that the manufacturers being full with orders, the zinc sheets would not be ready for shipment as soon as had been expected, and he was asked whether he agreed to give an extension of time or desired to cancel the indent. Simultaneously the plaintiff wrote that the contract time had been exceeded and that he would buy similar goods in Bombay on the defendants' account. This the plaintiff did, and brought this action to recover the difference in price as damages on account of the defendants having failed to perform their contract for the delivery of forty-eight casks of zinc sheets.

Held, that neither the defendants nor their Paris firm had entered into any contract of sale on which they were liable to the plaintiff. They had only constituted themselves his agents to "place" his order, *i. e.* to effect a contract of purchase on his account with the manufacturers of zinc, and consequently the action as brought would not lie.

Ireland vs. Livingston(1), and *Cassaboglou vs. Gibb*(2) discussed and considered.

CASE stated for the opinion of the High Court by W. E. Hart, Chief Judge.

1. This is a suit to recover the sum of Rs. 692 as damages which the particulars of claim annexed to the summons describe as payable to the plaintiff on account of the defendants having failed to perform their contract dated 27th June 1887 for the delivery of forty-eight casks of zinc sheets therein mentioned. The defendants denied contract, breach, and damages.

2. At the trial the following facts were admitted or not disputed by the plaintiff's attorney and the defendants' pleader respectively.

3. The defendants trade in Bombay as merchants and commission agents and are a branch in Bombay of a Paris firm trading under the same name, who are the agents for the manufacturers of the zinc, the subject of the suit. The members of the Bombay firm are also members of the Paris firm. The Paris firm divides with the Bombay firm a commission of $2\frac{1}{2}$ per cent. on the orders obtained by the Bombay firm for zinc to be procured from the manufacturers by the Paris firm. This commission is included in the price charged to the indenter when the price is calculated in rupees, but when the price is calculated in sterling, the commission is separately charged and shown separately under the head of "commission" in the form of indent which the defendants require the indenter to fill up and

1889.

MAHOMED-
ALLY EBRA-
HIM PIRKHAH
vs.
SCHILLER,
DOSOGNE,
& COMPANY.

(1) L. R. 5 E. & I. App. 395.

(2) L. R. 11 Q. B. Div. 797.

1889.

MABOMED-
ALLY EBRA-
HIM PIRKHAN
vs.
SCHILLER,
DOSOGNE,
& COMPANY.

sign before forwarding the order to the Paris firm to be submitted by them to the manufacturers.

4. On the 27th of June 1887 the plaintiff ordered out a quantity of zinc sheets through the defendants in Bombay by an indent in the following form :

Messrs. SCHILLER, DOSOGNE, & Co.

Dear Sirs,—I hereby request you to instruct your agents to purchase for me (if possible) the undermentioned goods on my account and risk upon the terms stated below.

It shall be optional with your agents to execute the whole or any part of this order.

In case of any dispute as to the inferiority of quality, time of delivery, or otherwise, Messrs. Schiller, Dosogne, & Co. are always to have the option of either cancelling the order, or referring the matter to the arbitration of two European merchants or European assistants in mercantile firms; these to nominate an umpire if they cannot agree, and their, or in the latter case his, decision as to an allowance or otherwise to be final and binding upon both parties; the fees to be paid by the party against whom the dispute will be decided.

Terms of payment.—I authorize your agents to draw upon me for the total amount of invoice at the sight mentioned below at current rate of exchange, and such bill or bills I hereby bind myself to accept on presentation and pay at maturity. In the event of the goods arriving before the bills become due, I agree to retire the same.

Should I fail to accept or pay at maturity such bill or bills I hereby authorize you to dispose of the documents or goods either by private sale or public auction on my account and risk, and I hereby bind myself to make good any loss or deficiency that may arise from such sale and all expenses together with the usual brokerage and interest, waiving all claims to any advantage thereon.

The goods ordered by this indent to be insured on the best terms obtainable, you to be free of all responsibilities as regards the insurance.

All deficiency arising from packing, breakage, and shortage to be borne by me.

The decision of the Chamber of Commerce to be binding on me in all cases not provided for in the above clauses.

INDENT No. 586.

27th June 1887.

Indenter—M. E. Pirkhan. Commission—*nil*.

Mode of packing—In wooden casks zinc lined.

Mode of payment—Draft at thirty days' sight with documents attached.

Limit of time—Shipment in four lots, first in four to six weeks from the date of acceptance and the others to follow at about one month's interval.

Forty-eight wooden casks each five cwts. net zinc sheets 8 × 3, assorted as follows :

No. of gauge—5, 6, 7, 8, 9, 10, 11, 12, 14 to a cwt. 4, 4, 6, 8, 4, 8, 6, 8, forty-eight casks at Rs. 13 per cwt. free Bombay harbour.

It is agreed that in the event I will require the goods to be warehoused by you, you agree to take up the drafts for me and to put the goods in your godown, and I undertake to take delivery of the same within one month after the goods have been warehoused by you on payment to you of the cost with landing charges and other expenses you have incurred including interest at 9 per cent. No charge for godown rent.

MAHOMEDALLY EBRAHIM.

1889.
MAHOMED-
ALLY EBRA-
HIM PIRKHAH
vs.
SCHILLER,
DOSOGNE,
& COMPANY.

5. The plaintiff being subsequently informed by the defendants that the manufacturers could not undertake the above order at the price therein mentioned signed the following :

MEMORANDUM. *Bombay, 2nd August 1887.*

To SCHILLER, DOSOGNE, & Co., 55 Apollo Street, Fort.

I hereby agree to increase my limit from Rs. 13 to Rs. 13-2 per cwt. for the forty-eight casks zinc sheets ordered as per indent No. 586.

Subject to reply by wire within eight days. MAHOMEDALLY EBRAHIM.

6. The acceptance of the plaintiff's order at this increased price was notified to him by the defendants by a letter in the following form :

Bombay, 4th August 1897.

SCHILLER, DOSOGNE, & Co., 32 Rue de Hauteville, Paris.

Telegrame—Hindustan, Paris.

To M. E. PIRKHAH, Esquire, Bombay.

Dear Sir,—We have the pleasure to inform you that our Home firm has reported by wire of 3rd instant concerning your esteemed orders as follows :

Indent No.	Article.	Increased limit.	Our offer.
586	48 casks	Rs. 13-2 per	
	zinc sheets.	cwt. at Bombay.	

Remarks—Placed at your increased limit.

This information having been received by wire is subject to correct transmission, interpretation, and confirmation by letter.

Awaiting your further commands.

We are, dear Sirs, yours very faithfully,

SCHILLER, DOSOGNE, & Co.

7. No further communication passed between the parties.

8. The defendants wrote to the plaintiff a letter in the following form :

Bombay, 29th October 1887.

SCHILLER, DOSOGNE, & Co., 32 Rue de Hauteville, Paris.

Telegrame—Hindustan, Paris.

To M. E. PIRKHAH, Esquire, Bombay.

Dear Sir,—We have the pleasure to inform you that our Home firm has reported by the mail of the 7th instant concerning your esteemed orders as follows :

1889.
 MAHOMED-
 ALLY EBRA-
 HIM PIRKHAN
vs.
 SCHILLER,
 DOSOGNE,
 & COMPANY.

Indent No.	Article.	Your limit.	Our offer.
586	48 zinc sheets.		

Remarks—Our Home firm informs us that the maker being full with orders could not deliver the goods in due time and will ship only as soon as he possibly can. Please let us know whether you agree to the extension of time, or want to cancel the indent.

Awaiting your further commands.

We are, dear Sir, yours very faithfully,

SCHILLER, DOSOGNE, & Co.

9. Before receipt of the letter the plaintiff had already written on the same day to the defendants as follows :

Messrs. SCHILLER, DOSOGNE, & Co., Bombay. 29th October 1887.

Dear Sirs,—Referring to my order No. 586, dated 27th June last, advised as accepted on the 4th August 1887, for zinc sheets, I beg to intimate that the shipment time of the first lot has been already exceeded and no invoice has as yet been given to me for the same. Under the circumstances I hereby give you notice that I am causing local purchases to be made on your account, and will hold you responsible for all differences and deficit costs and charges.

Yours very faithfully, M. E. PIRKHAN.

10. To this letter the defendants replied as follows :

Bombay, 12th November 1887,
 55 Apollo Street, Fort.

SCHILLER, DOSOGNE, & Co., 32 Rue de Hauteville, Paris.

Telegrams—Hindustan, Paris.

M. E. PIRKHAN, Bombay.

Dear Sir,—Replying to your letter of the 7th instant we are surprised to see the claim you make for non-delivery of goods. We beg to observe that, according to the terms of agreement signed by you, you have requested us to purchase forty-eight casks of zinc sheets for your account and risk, and that we are not in any way bound to deliver you the goods which our Home friends have advised through us as placed.

Besides, it is a simple matter for prior consideration that, if the manufacturers are unable to ship the goods within the time stipulated, you can only allow them to ship after the date fixed, or instruct them through us to cancel the order as is the system of trade everywhere.

Yours truly,

SCHILLER, DOSOGNE, & Co.

11. The plaintiff on the same day, 12th November, by his attorneys, wrote to the defendant as follows :

Sirs,—We are instructed by our client, Mr. Mahomedally Ebrahim Pirkhan, that on the 27th June last he gave you an order for forty-eight casks of zinc sheets, 8×3 assorted, at Rs. 13 per cwt. free Bombay harbour. The said goods were to arrive in two lots, the first shipment within four to six weeks from the date of the acceptance, and the second shipment within a month after that. We are instructed that shortly afterwards you intimated to our client

that your Home firm would not accept his offer, and desired him to increase it a little. Accordingly the offer was increased to Rs. 13-2-0 per cwt., and subsequently you duly informed our client that his offer had been accepted and the contract closed.

The time to give delivery of the first shipment expired some time ago, and although our client repeatedly required you, both verbally and by letters, to carry out the contract and deliver to him the goods, you have failed and neglected to do so. You have thus committed a breach of contract. The market rate of goods of this kind has gone up, and our client has sustained damages by your breach of contract. We are therefore instructed to demand from you the sum of Rs. 346, being the amount of difference between the contract price and the market rate, and we have to give you notice that in default of your failing to pay the said sum within twenty-four hours from the service hereof upon you, an action will be filed against you to recover the same at your risk and peril as to costs and charges.

Yours truly,

THAKORDAS, DHARAMSEY, AND CAMA.

12. To this defendants replied in the following form :

Bombay, 14th November 1887.

55 Apollo Street, Fort.

Messrs. THAKORDAS, DHARAMSI, & CAMA, Solicitors, High Court, Bombay.

Sirs,—We duly received your letter of the 12th instant, and are sorry to see that your client is quite under a wrong impression regarding the indent for forty-eight casks of zinc sheets which he gave us some time ago. If you will please refer to our Mail reports of 4th August and 29th October last, of which we enclose copies, you will see that this order was never definitively accepted by us.

Yours faithfully,

SCHILLER, DOSOGNE, & Co.

13. No evidence of the contract between the parties was offered other than the documents above set out. I was of opinion that they showed; as between the plaintiff and defendants, a contract of agency, not of sale, and that consequently the suit in its present form could not succeed.

14. As regards the relations between the plaintiff and defendant, it seemed to me that the indent of 27th June 1887 showed that the former employed the latter as his agent only to forward his order to the Paris firm, who were in fact the principals in the contract of agency to deal with the manufacturers who were to supply the zinc and were disclosed as such by the form of the defendants' subsequent letters to the plaintiff. So that even as agents the Bombay firm would be liable to plaintiff for their misconduct only in the transmission of the order to, and of the replies received from, the Paris firm, and not for the misconduct of the latter firm in conducting the

1889.

MAHOMED-
ALLY EBRA-
HIM PIRKHAH
vs.
SCHILLER,
DOSOGNE,
& COMPANY.

1889.

MAHOMED-
ALLY EBRA-
HIM PIRKHAN

vs.

SCHILLER,
DOSOGNE,
& COMPANY.

business of the agency with the manufacturers, while neither the Bombay firm nor the Paris firm seemed to me to have ever rendered themselves liable as vendors to the plaintiff upon a contract to sell and deliver. But the damages in the present suit are claimed as arising from a breach of a contract of sale, not of a contract of agency. Therefore, as no application was made to me to amend the summons or withdraw the suit, I dismissed the suit with costs Rs. 34.

15. As the amount was above Rs. 500, the plaintiff's attorneys then claimed to have a case stated for the opinion of the High Court on points of law which he formulated in the following questions :

(1) Whether the defendants' letter to the plaintiff of 4th August 1887 did not amount to an undertaking by the defendants to deliver to the plaintiff according to the indent ?

(2) Whether, consequently, the relation of vendor and purchaser was not thereby established between the defendant and the plaintiff ?

To which I think might be added :

(3) Whether there was any consideration for such undertaking and the consequent change in the relations subsisting between the plaintiff and the defendants ?

16. I now beg respectfully to submit, for the opinion of their Lordships, the questions above set forth in the last preceding paragraph of this statement. If they are answered in the affirmative, the present order for dismissal with costs will be set aside and the hearing be resumed to take evidence for the purpose of assessing the damages, otherwise the present order will stand.

Jardine for plaintiff.

Russell for defendant.

JUDGMENT OF THE HIGH COURT—(Sir C. Sargent, C.J.,
and Bailey, J.)

This reference from the Small Causes Court is one of considerable importance, and arises out a suit brought by the plaintiff, Mahomed-ally Ebrahim Pirkhan, against the defendants, who carry on trade in Bombay as merchants and commission agents under the style of Schiller, Dosogne, & Company, and are a branch of a French firm trading in Paris under the same name, who are agents for certain

manufacturers of zinc, to recover damages on account of the defendants having failed to perform their contract for the delivery of forty-eight casks of zinc sheets. The facts of the case, as found by the Judge of the Small Causes Court, are, that plaintiff on the 27th June 1887 ordered out a quantity of zinc sheets through the defendants' firm in Bombay by an indent in the following form: "I hereby request you to instruct your agents to purchase for me (if possible) the undermentioned goods on my account and risk upon the terms stated below." On 2nd August 1887 the plaintiff consented to increase his limit of price from Rs. 13 to Rs. 13-2 per cwt., subject to reply by wire within eight days. On 4th August the plaintiff received the following letter from the defendants' firm: "We have the pleasure to inform you that our Home firm has reported by wire of the 3rd instant concerning your esteemed orders as follows:—Indent No. 586, article forty-eight casks zinc sheets, increased limit Rs. 13-2-0 per cwt. Remarks—*Placed at your increased limit.* This information having been received by wire is subject to correct transmission, interpretation, and confirmation by letter. Awaiting your further commands." On 29th October 1887 plaintiff was informed by the defendants that they had been informed by their Home firm that the maker being full with orders could not deliver the goods in due time, and would ship as soon as he possibly could. Plaintiff was asked to let them know whether he agreed to the extension of time or wished to cancel the indent. This led to a correspondence as to which it is unnecessary for the purposes of this reference to say more than that it closed with the plaintiff insisting on his right to be paid for the difference between the price of the first shipment and what he would have to pay in the market, where the price had gone up to Rs. 16 per cwt. The Judge rejected the claim on the ground that the plaintiff's contract with defendants was one of agency and not of vendor and purchaser, and that the defendants could only be held liable for negligence in carrying out plaintiff's orders which would be a different cause of action. The questions referred to us are (1) whether the defendants' letter to plaintiff of 4th August 1887 did not amount to an undertaking by the defendants to deliver to the plaintiff according to the indent; (2) whether, consequently, the relation of vendor and purchaser was not thereby established between the defendants and plaintiff.

It was contended for the plaintiff that the indent and the letter of 4th August 1887 constituted a contract for sale by the defendants

1889.

MAHOMED-
ALLY EBRA-
HIM PIRKHAH
vs.
SCHILLER,
DOSOGNE,
& COMPANY.

1889.

MAHOMED-
ALLY EBRA-
HIM PIRKHAH
vs.
SCHILLER,
DOBOGNE,
& COMPANY.

on behalf of the manufacturer of zinc in Paris, and that the case therefore fell within the ruling in *Thomson vs. Danenport*⁽¹⁾ and *Paterson vs. Gandasequi*,⁽²⁾ that when an agent enters into a contract for a foreign principal the agent is liable on the contract as the party to whom the other contracting party is supposed to give credit. But this indent is in form only a letter of instructions to the defendants to buy for the plaintiff, and in the letter of 4th August the defendants only inform the plaintiff that his instructions have been carried out by "placing" his order, by which must be understood that a contract of purchase had been entered into with some manufacturer of zinc. It would be straining language to hold that these documents amount to a contract of sale entered into by the plaintiff with the defendants on account of a foreign manufacturer. The indent contemplates the purchase by the defendants through their agents in Paris, and the transaction, so far as the indent by itself is concerned, is the same as if the plaintiff had written to the defendants at Paris instructing them to buy for them. The nature of such a dealing between a merchant in one country and a commission agent in another is discussed at great length in *Ireland vs. Livingston*.⁽³⁾ That case came in succession before the Court of Queen's Bench, the Exchequer Chamber, and the House of Lords. The defendant was a merchant carrying on business in Liverpool and instructed the plaintiffs, commission agents at the Mauritius, to purchase for him 500 tons of sugar to cover cost, freight, and insurance, fifty tons more or less of no moment if it enables you to get a suitable vessel. The plaintiffs were unable to execute the orders at the maximum price fixed, except to the extent of about 393 tons, and having shipped these to England, drew bills against the shipment, which were refused acceptance by the defendant, on the ground that a shipment of less than 400 was not a compliance with the order, and he was therefore not obliged to accept the sugar or honour the draft. An examination of the judgments of the twelve Judges who took part at some stage or other in the action shows that, with the exception of Mr. Baron Martin, the transaction between the parties was regarded by the Judges as one between principal and agent, and was construed as such, and this was finally adopted by the House of Lords in deciding the case for the plaintiffs. Mr. Baron Martin,

(1) 9 B. & C. 78.

(2) 15 East, 62.

(3) L. R. 5 H. L. C. 395.

however, who had been a member of the Exchequer Chamber, and was also summoned to give his opinion in the House of Lords, held the relationship of the parties to be one of vendor and vendee, and construed the instructions on that assumption in favour of the defendant. Mr. Justice Blackburn in delivering his opinion in the House of Lords, whilst agreeing with the majority of the Judges, made the following remarks which were much relied on by counsel for the plaintiff. He says at page 408: "It is quite true that the agent who, in thus executing an order, ships goods to his principal, is, in contemplation of law, a vendor to him. The persons who supply goods to a commission merchant sell them to him and not to his unknown foreign correspondent, and the commission merchant has no authority to pledge the credit of his correspondent for them. There is no more privity between the person supplying the goods to the commission agent and the foreign correspondent than there is between the brickmaker who supplies bricks to a person building a house and the owner of that house. The property in the bricks passes from the brickmaker to the builder, and, when they are built into the wall, to the owner of that wall, and just so does the property in the goods pass from the country producer to the commission merchant, and then, when the goods are shipped, from the commission merchant to his consignee. And the legal effect of the transaction between the commission merchant and the consignee who has given him the order, is a contract of sale passing the property from the one to the other, and consequently the commission merchant is a vendor and has the right of one as to stoppage *in transitu*. I therefore perfectly agree with the opinion expressed by Baron Martin in the Court below, that the present is a contract between vendor and vendee, but I think he falls into a fallacy when he concludes therefrom that it is not a contract as between principal and agent. My opinion is, for the reasons I have indicated, that when the order was accepted by the plaintiffs there was a contract of agency by which the plaintiffs undertook to use reasonable skill and diligence to procure the goods ordered at or below the limit given, to be followed up by a transfer of the property at the actual cost, with the addition of the commission, but that this superadded sale is not in any way inconsistent with the contract of agency between the parties, by virtue of which the plaintiffs were under the

1869.

MAHOMED-
ALLY EBRA-
HIM FIRKHAN
VS.
SCHILLER,
DOSOGNE,
& COMPANY.

1889.

MAHOMED-
ALLY BEER-
HIM PIRKHAH
vs.
SCHILLER,
DOSOGNE,
& COMPANY.

obligation to make reasonable exertions to procure the goods ordered as much below the limit as they could." These remarks of Mr. Justice Blackburn, which were doubtless open to misconstruction, were afterwards the subject of discussion in *Cassaboglou vs. Gibb*,⁽¹⁾ where the plaintiff, a merchant in London, sought to make the defendants, commission agents in Hongkong, liable as vendors for the difference between the market value of the opium ordered by the plaintiff and that actually sent. But the Court held that the plaintiffs could not treat the defendants as vendors, but only as agents, who would be liable only for the actual loss sustained by the plaintiffs through their negligence and which was admittedly less than what the plaintiffs claimed. Brett, M.R., says: ⁽²⁾ " Lord Blackburn has not said that as long as the contract of principal and agent is executory, the principal can sue the agent, and make him pay as though the contract were that of vendor and purchaser. He has considered the point with reference to two matters only; one, with regard to the theory of passing the property in the goods, and the other as to the power of stopping the goods *in transitu*." The same view was taken by Lord Justice Fry. This must be regarded as a conclusive authority that the relationship between the parties continues throughout, except for certain special purposes, to be one of principal and agent. There might, of course, be a practice of the trade by which the commission agent is understood to guarantee the performance of the contract by the foreign manufacturers, but no evidence was given of such custom. The clause in the indent by which the defendants are enabled in case of dispute as to inferiority of quality, time of delivery, or otherwise to cancel the order or refer it to arbitration would be inserted for the protection of the commission agent in either character, and therefore affords no reason for assuming the existence of any custom on the subject. We must, therefore, answer the questions referred to us in the negative. Plaintiff to pay costs of the reference.

Attorneys for plaintiff—*Thakoredas, Dharamsi, and Cama.*

Attorneys for defendant—*Craigie, Lynch, and Owen.*

(1) L. R. 11 Q. B. D. 797.

(2) At page 803.

GOKULDA'S MADHAVJI, PLAINTIFF, versus NURSU YENKUJI,
DEFENDANT.*

1889.
Sept. 6 & 13.

*Agreement for permission to quarry—License necessary—Non-renewal of license
—Construction of agreement—Conditional or unconditional promise to pay.*

By an agreement (in renewal of similar agreements for the two previous years) dated the 3rd September 1888 the defendant agreed to pay the plaintiff "rent" for a piece of hilly ground, at the rate of Rs. 329 per month for one year, during which time the defendant was to be allowed to blast stones and carry on the work of quarrying to the extent of seven crowbars, such quarrying to be done at such places as the plaintiff had pointed out, or should choose to point out from time to time. The rent to be paid was arrived at on a calculation of Rs. 47 per crowbar, and was to be payable whether defendant employed the seven crowbars or less. The defendant by the sixth clause of the agreement further undertook as follows: "As regards the police arrangement and other expenses at the time of blasting stones and obtaining an order or license &c., and as to any other kind of expenses, risk, and responsibility, all these are upon me. I will duly pay you at the rate of Rs. 329 per month clear until the fixed time." The defendant was a stone contractor and had been employed in the work of quarrying all his life, and for the previous two years on this very spot, and was well aware that blasting could not be carried on without a license from the authorities which was revocable at any time, and required renewal annually. At the time of the agreement the defendant was in possession of a license, which expired on the 31st December 1888. After that date the authorities refused to renew the license, on the ground that the quarry where operations were being carried on was surrounded by houses on all sides, and the defendant thereupon refused to continue the payment of the monthly rent of Rs. 329. The plaintiff accordingly brought this suit in the Small Cause Court for three months' rent at the above rate.

Held, looking at the nature of the contract, that it must be taken to have been the intention of the parties to it that the monthly sum of Rs. 329 should only be payable as long as quarrying was permitted by the authorities, and that there was no unconditional contract to pay Rs. 329 in all events in clause 6 of the agreement or elsewhere.

Taylor vs. Caldwell⁽¹⁾ followed, *Marquis of Bute vs. Thomson*⁽²⁾ and *Ridgway vs. Sneyd*⁽³⁾ commented on and distinguished.

CASE stated for the opinion of the High Court by W. E. Hart, Chief Judge.

1. The plaintiff is the owner of a stone quarry in a piece of a hilly ground situated at Gunpowder Road, Mazagaon, and the defendant is a stone contractor who contracts with the owners of such places for the purchase of stone to be quarried and removed by his own labour.

* Reported at I. L. R. 13 Bom. 630.

(1) 3 B. & S. 826; 32 L. J. Q. B. 164.

(2) 13 M. & W. 487.

(3) Kay, 627.

1889.

GOKULDAS
MADHAVJI
VS.
NURSU
YENKUJI.

2. On the 3rd September 1888, the defendant executed a Gujarati agreement, translation whereof is as follows :

"To THAKAR GOKULDAS MADHAVJI by VANJAN NABSU YENKU.

"To wit,—I have taken on rent from you your ground for carrying on a stone quarry in your hilly ground behind the temple of Mankeshwar in Mazagaon. I have made with you the terms of the agreement in respect thereof; the following are the particulars thereof.

"(1) In this hilly ground I am to carry on (or work) 7, namely seven crowbars for blasting stones. The rent in respect thereof is fixed at the rate of Rs. 329 per month in respect of seven crowbars, at the rate of Rs. 47 for one crowbar. The rent is duly to accrue from the 6th day of September in the year 1888. I will continue to pay you the same one month in advance from the date of the current month.

"(2) In this ground of the hill I am to blast stones and carry on the work of the seven crowbars only in as much space as you have pointed out to me, and in as much space and at such places as you may hereafter from time to time cause to be pointed out in the ground of this hill. Until the fixed time of this writing I am duly to take the stones which may turn up therein. With the exception of blasting stones with seven crowbars I have no right to take out or blast loose stones with extra crowbars, nor have I any right to take them, and I am not to take them away.

"(3) The time for carrying on the work of those seven crowbars is fixed at twelve months from the 6th day of September 1888. Until that time I may carry on (or work) seven crowbars, or I may carry on (or work) less crowbars; nevertheless I will duly pay you at the rate of Rs. 329 per month in respect of the seven crowbars up to the fixed time. I am not to raise any dispute therein.

"(4) As to the stones which may turn up by blasting with these seven crowbars, or the stone metal which I may break these stones into, I am duly to remove and take away this broken stone metal or stones from your compound. I will not keep a depôt in your compound. If I shall keep any, you may write to me a letter with three days' time; within that time I will duly take away the goods so kept, or the goods which may be lying there. If I do not take away the same, I will duly pay you at the rate of Rs. 15 per day in respect of rent after that time.

"(5) As to the earth which may turn up by my carrying on the work of the seven crowbars, I will duly cause that earth to be thrown at my expense at such places as you may cause to be pointed out to me in your ground of the hill. I have no right of any kind whatsoever to that earth.

"(6) I am to carry on the work of the seven crowbars in respect of blasting stones. As regards the police arrangement and other expenses at the time of blasting stones and obtaining an order or license &c., and as to any other kind of expenses, risk, and responsibility, all these are upon me. I will duly pay you at the rate of Rs. 329 per month clear until the fixed time.

"(7) I will not blast stones below the level of this ground, nor am I to

take out stones therefrom. I will duly do my work above the level of this ground.

“(8) I am to carry on the work of the seven crowbars written above. If I or my men were to employ an eighth crowbar at any time, I will duly pay you at the rate of Rs. 20 per day in respect of rent on account thereof.

“(9) In the event of not acting in conformity with the agreement mentioned in this writing, or delaying payment of rent, or acting contrary to the terms of the writing, you may forthwith stop my quarry of the seven crowbars, and you have a right to or over all my stones or broken stone metal, and other goods belonging to me which may be there, and I will duly pay you the rent up to the fixed time mentioned in this writing. Besides this, whatever loss and expenses you may incur in respect hereof, all those are duly upon me.

“(10) Opposite to this ground of the seven crowbars there are pits (or holes) made on my behalf in two or three plots of ground; water is to be taken out or drawn from those pits, and on throwing earth in those very pits, I will duly make the level thereof with that of the *sarkāri* or public road. The expenses which may be incurred in respect thereof are all upon me. I am duly to do the same in two months from the date mentioned in this writing; and if I do not do it, you may get it done on my account by any person whatsoever. Whatever expenses may be incurred in respect thereof I am duly to make good and pay you the same without dispute.

“(11) In this ground of the hill and chawls your other tenants are living and may hereafter come to live. I will not cause any inconvenience of any kind or loss to them. If I do, I am duly to be answerable in respect thereof.

“In this manner I have given this in writing of my own will and accord and in sound mind and understanding; the same is duly agreed to by, and binding on me and on my heirs and executors.”

At this time the defendant was the holder of a license from the Deputy Commissioner of Police allowing him to carry on blasting operations in the plaintiff's quarry till the 31st December 1888. As these went on they gradually receded further from the road and approached nearer to the houses in the neighbourhood.

3. On applying for a fresh license for the year 1889 to the Commissioner of Police, the defendant was informed on 22nd February 1889 that the Municipal Commissioner objected to the renewal of the license for the current year, as the quarry where the operations were to be carried on was surrounded by houses on all sides.

4. The defendant then applied for a license to the Municipal Commissioner, who, after reference to the Executive Engineer on 29th April 1889, finally replied that it was not safe to allow the blasting operations any longer at the place referred to.

5. In the meantime the defendant had informed the plaintiff,

1889.

GOKULDAS
MADHAVJI
vs.
NURSU
YENKUJI.

1889.

GOKULDÁS
MADHAVJI
VS.
NURSU
YENKUJI.

by letter of the 5th February 1889, of the refusal of the Commissioner of Police to grant a license for blasting in the plaintiff's quarry during the current year, as the ground was unfit for such purposes, and had given notice that he had in consequence ceased to work there, and considered the agreement void for its unexpired portion, and declined to make any further payment under it.

6. To this plaintiff replied, on the 6th February, that he was not concerned with the grant of license to the defendant, who was bound by the distinct terms of his agreement to pay Rs. 329 per month for a year from 6th September 1888, whether he carried on blasting operations or not.

7. This suit has now been brought by the plaintiff on the agreement to recover Rs. 987, being three sums of Rs. 329, payable in advance on 6th February, 6th March, and 6th April. It is admitted that all sums previously due have been paid and that these have not, and that during the period which these payments should have covered, viz., from 6th February to 6th May, the defendant has done no work in the plaintiff's quarry. It is also admitted that it would be illegal for the defendant to blast without a license to be obtained from the Commissioner of Police, before the coming into force of the City of Bombay Municipal Act, 1888, and after that date from the Municipal Commissioner. Nor is it contended in the present case that the license was wrongly refused by either, or on any ground other than that of danger to the surrounding houses and their inmates.

8. I found that the defendant was in no default in applying for the license, or informing the plaintiff of his failure to obtain one, and that there was no obligation on the plaintiff to obtain one; but that, without the fault of either party the operation of blasting stone in the plaintiff's quarry, which was legal at the time they entered into their agreement, had become illegal before the date at which the first payment sued for would have been payable under that agreement.

9. The only question argued at the trial was whether this exonerated the defendant from his obligation under the agreement to pay Rs. 329 per month for a year from the 6th September 1888. I held that it did, because I found the only consideration for the defendant's payment was the plaintiff's permission to go on his land for the purpose of blasting with seven crowbars and removing the

stone so blasted, which purpose having become unlawful, the plaintiff could not now lawfully perform his part of the contract, and therefore the defendant's agreement was voided by reason of illegality of its consideration. (See Pollock on the Principles of Contract, 2nd edn., pages 282 and 340.) I therefore dismissed the suit with costs Rs. 85.

10. This sum the plaintiff has now deposited in Court together with the sum of Rs. 50 to cover the costs of a reference to the High Court, which he desires to be made on the questions :

1st—Whether the agreement of 3rd September 1888 has become void ?

2nd—Whether the defendant is not, in any event, liable, under the terms of the sixth clause of that agreement, to pay to the plaintiff the sum sued for ?

To these the defendant desires to add :

3rd—Whether, in the events that have happened, the defendant is not discharged from all liability under the said agreement ?

11. I therefore respectfully crave the opinion of their Lordships on these questions, and, in case they should desire any further information not contained in the above statement I hereto annex a copy of my judgment delivered on the 7th August 1889.

The only material additional fact found in the judgment alluded to was the fact that the defendant had all his life been a stone contractor and had worked the same quarry for the two previous years under similar agreements with the plaintiff and was well aware of the nature and revocability of a license to blast stone.

Inverarity and *Anderson* for plaintiff.

Starling for defendant.

The following cases were cited :—*Paradine vs. Jane*⁽¹⁾ ; *Barker vs. Hodgson*⁽²⁾ ; *Barly vs. DeCrespigny*⁽³⁾ ; *Taylor vs. Caldwell*⁽⁴⁾ ; *Marquis of Bute vs. Thompson*⁽⁵⁾ ; *Ridgway vs. Sned*⁽⁶⁾ ; *Phillips vs. Jones*⁽⁷⁾ ; *Appleby vs. Myers*⁽⁸⁾ ; *Clifford vs. Watts*⁽⁹⁾.

(1) Aleyn. 26.

(2) 3 M. & S. 267.

(3) L. R. 4 Q. B. 150.

(4) 3 B. & S. 826 ; 32 L. J. Q. B. 164.

(5) 13 M. & W. 487.

(6) Kay, 627.

(7) 9 Sim. 519.

(8) L. R. 2 C. P. 651.

(9) L. R. 5 C. P. 577.

1889.

GOKULDÁS
MADHAVJI
vs.
NURSU
YENKUJI.

1889.

GOKULDÁS
MADHAVJI
VS.
NURSU
YENKUJI.

JUDGMENT OF THE HIGH COURT (Sir C. Sargent, C.J.,
and Bayley, J.).

This reference from the Small Cause Court arises out of a claim for Rs. 981 alleged to be due to plaintiff upon an agreement entered into with him by the defendant on the 3rd September 1888. By this agreement the defendant agreed to pay the plaintiff rent for a piece of hilly ground at the rate of Rs. 329 per month for one year, during which time the defendant was to be allowed to blast stones and carry on the work to the extent of seven crowbars. At the time of the agreement the defendant had a license from the Commissioner of Police, which expired on the 31st December 1888. On his applying for a fresh license he was informed that the Municipal Commissioner objected to the license being granted, as the quarry where the operations were being carried on was surrounded by houses on all sides. By the agreement the plaintiff had the power of pointing out where the defendant was to quarry. But it is admitted that there is no other part of the hill which could be used by the defendant for the purpose except the part to which the Municipal Commissioner objects. The Judge of the Small Cause Court held that the agreement was rendered void by the quarrying being forbidden by the legal authorities. But it is to be remarked that the contract includes no agreement to quarry. The plaintiff performed his part of the contract when he pointed out the land for the defendant's use. The defendant's only obligation was to pay Rs. 329 per month to the plaintiff, and this the defendant could have done, from a legal point of view, whether the quarrying was forbidden or not, as was pointed out by Blackburn, J., in *River Wear Commissioners vs. Adamson*,⁽¹⁾ when discussing the effect of the decision in *Paradine vs. Jane*.⁽²⁾ The question for determination, in our opinion, is whether by reason of the quarrying having been stopped the defendant is relieved from his liability to pay the monthly sum of Rs. 329 as provided by the agreement. We may remark, in the first instance, that this was not a contract of "letting." The plaintiff was to remain in possession and point out certain places on the hill where the defendant might quarry with power to change these from time to time. It was, as in *Taylor vs. Caldwell*,⁽³⁾ a contract merely to give the defendant the use of

(1) L. R. 2 App. Ca. 770. (2) Aleyn. 26. (3) 3 B. & S. 926; 32 L. J. Q. B. 164.

such places as he might point out. Now, the general rule is, as stated by Blackburn, J., in *Taylor vs. Caldwell*,⁽¹⁾ that "where there is a positive contract to do a thing, not in itself unlawful, the contractor must perform it or pay damages for not doing it, although in consequence of unforeseen accidents the performance of his contract has become unexpectedly burdensome or even impossible." Such being the general rule, there is, however, a class of cases in which, notwithstanding the general rule, the defendant has been excused from performing his contract by an occurrence which neither party can reasonably be supposed to have contemplated, or, as it was said in *Baily vs. DeCrespigny*,⁽²⁾ which was not within the contract.

In *Taylor vs. Caldwell*,⁽¹⁾ where the defendant had contracted to give the plaintiff the use of the Music Hall on certain days, and the Music Hall was accidentally burnt down before the time arrived for the plaintiff to have the use of it, the Court held the defendant to be discharged from his obligation, on the ground that there was an implied condition in the contract that the hall should continue in existence. So in *Clifford vs. Watts*,⁽³⁾ the Court held the defendant excused from his obligation to extract not less than 1,000 tons of potter's clay annually paying a royalty of 2s. 6d. per ton, on the ground that the parties contracted on the assumption that there were 1,000 tons of potter's clay on the land. Again, in *Baily vs. DeCrespigny*,⁽²⁾ where in a covenant in a demise that the defendant should or would not permit to be built any messuage on a paddock fronting the demised premises, and the paddock was taken up by the London and Brighton Railway Company, who erected a railway station on it, the defendant was discharged from his covenant, because its words were not used with reference to the possibility of the particular contingency which afterwards happened. These cases show, as stated in Pollock on Contracts, page 351 (4th ed.), that the tendency of decisions is "to treat the subject as one to be governed by rules of construction rather than by rules of law."

Passing to the contract in question, it is to be remarked that by clause 1 the rent of Rs. 329 per month is arrived at by calculating Rs. 47 in respect of each of the seven crowbars which the defendant

1889.

GOULDAS
MADHAVJI
vs.
NURSU
YENKUJI.

⁽¹⁾ 3 B. & S. 826; 32 L. J. Q. B. 164.⁽²⁾ L. R. 4 Q. B. 150.⁽³⁾ L. R. 5 C. P. 577 at page 588.

1889.

GOCULDÁS
MADHAVJI
vs.
NURSU
YANKUJI.

was authorized to work with. This shows that the obligation to pay Rs. 329 per month was based on the assumption that the defendant would be able to work the crowbars; although the amount of stone which the defendant would be able to extract by such work would be necessarily more or less uncertain, more especially having regard to the clause which enabled the plaintiff to point out the particular places where the defendant was to work. No doubt, both parties must be taken to have been aware that the authorities had the power of stopping the quarrying if it was dangerous to the public, but quarrying had been going on in the plaintiff's hill up to that time, and it is only reasonable to suppose that the parties entered into the contract on the assumption that quarrying would continue to be permitted by the authorities.

It is not alleged that the veto which the authorities have put on the quarrying was owing to the defendant's careless or improper mode of blasting; the only reason assigned by the Commissioner of Police is, that the blasting was dangerous to the neighbouring houses and their inmates. Nor is it alleged by the plaintiff that he can point out any other spot for blasting to which the authorities would not equally object, and, therefore, this crowbar work, upon which the rent was based, thus became impossible without either party being to blame for it. We think that, looking at the nature of this contract, it would defeat the intention of the parties were we to regard the defendant's obligation to pay the monthly rent Rs. 329 as in substance unconditional on quarrying being allowed, and that the contract must be taken to have been entered into on the assumption that the authorities would permit quarrying, just as in *Clifford vs. Watts*,¹⁾ the contract was held to have been based on the assumption that there were 1,000 tons of clay to be extracted. The cases of the *Marquis of Bute vs. Thompson*⁽²⁾ and *Ridgway vs. Sneyd*,⁽³⁾ relied on for the plaintiffs, were cases of mining leases and are distinguishable from the present case. The former is discussed in *Clifford vs. Watts*⁽¹⁾ (at page 588), where it is pointed out that a minimum rent was agreed to be paid in any case. In *Ridgway vs. Sneyd*,⁽³⁾ the decision refusing to relieve the plaintiff from his liability was mainly based on the same consideration.

¹⁾ L. R. 5 C. P. 577.²⁾ 13 M. & W. 487.⁽³⁾ Kay, 627.

It was said indeed that article 6 of the agreement threw the risk of obtaining leave to quarry on the defendant, but we think that on the reasonable construction of the language of that clause, all that was intended was to throw on the defendant the expenses to be incurred in carrying out the police arrangement and obtaining the license and to prevent his having any cause of complaint on that account against the plaintiff; but that is quite a different thing from making the obligation to pay the rents absolute whether the quarrying was stopped altogether or not. It was said, indeed, that it was only the blasting which was forbidden, and that the defendant might have quarried by other means, but there is no finding in the case that any other means were practically feasible, or that blasting by means of some description of explosive is not, practically speaking, an essential part of quarrying stone on the plaintiff's hill.

We must, therefore, answer the first question in the negative, the second question in the negative, and the third in the affirmative.

Costs to be costs in the cause.

Attorneys for plaintiff—*Pestonji and Rustom.*

Attorneys for defendant—*Payne, Gilbert, and Sayani.*

1889.
GOCULDAS
MADHAVJI
vs.
NURSU
YENKUJI.

THE GREAT INDIAN PENINSULA RAILWAY COMPANY, PLAINTIFFS, versus HANMANDA'S RAMKISON AND VIRJI HUNRAJ, DEFENDANTS.*

1889.
Sept. 27.

Stoppage in transitu—Railway receipts—Effect of endorsing railway receipts—

Title of indorsee of such receipts—Contract Act (IX. of 1872) section 103.

The firm of China Devakaran carried on business in Bombay. A., the agent of the firm, bought from the first defendant, Hanmandas, at Bijapur, a quantity of wheat which at A.'s request was on the 28th and 29th May 1889 consigned by Hanmandas to the firm of China Devakaran at Bombay on the understanding that the consignees were not to have the wheat until they had paid the *hundis* drawn in respect of it. The wheat was sent to Bombay on the 28th and 29th May 1889 in three consignments, namely of 56, 104, and 181 bags respectively, and two *hundis* for Rs. 1,000 and Rs. 1,500 respectively, payable at sight, were drawn by A. in Bijapur on the firm of China Devakaran in Bombay, and were given by him to the first defendant Hanmandas, who thereupon handed to A. the three railway receipts for the three consignments which had been despatched by the first defendant's agent at Bijapur railway station. The *hundis* were sent by the first defendant Hanmandas to his agent in

* Reported at I. L. R. 14 Bom. 57.

1889.

THE G. I. P.
RAILWAY
COMPANY
vs.
HANMANDÁS
RAMKISON.

Bombay for collection. The *hundi* for Rs. 1,000 arrived in Bombay on the 31st May, and was paid on the 1st June. The *hundi* for Rs. 1,500 arrived in Bombay on the 1st June and was dishonoured on the 2nd June by the firm of China Devakaran. The railway receipts given by the first defendant to A. at Bijápur were in the following form :

"Received from Hanmandás Ramkison the undermentioned goods, 181 bags of wheat.

"This receipt must be produced by the consignee or the goods will not be delivered. If he does not himself attend, he must endorse a request for delivery to the person to whom he wishes it made. If the consignment or this railway receipt is sold one or more times, the endorsement must be a distinct order to deliver to a certain person or firm, and this order must be on a one anna stamp. If more than one order appear on the face hereof, each order must bear a stamp.

" $\frac{I}{we}$ hereby certify that $\frac{I}{we}$ $\frac{am}{are}$ aware that the Southern Mahratta Railway has received the abovementioned goods subject to the conditions noted on the back, and that $\frac{I}{we}$ agree that it should receive them subject to these conditions. (Sender's Signature)."

On obtaining these railway receipts A. sent them at once to the firm of China Devakaran in Bombay, and on the 31st May 1889 they were endorsed by China Kanji, a member of the firm, to the second defendant, Virji Hunsraj, to secure an advance of Rs. 2,000. The endorsement was as follows : "Signature of China Devakaran. I have sold the delivery as per this receipt to Virji Hunsraj. The handwriting of China Kanji." Two consignments (namely, 56 bags and 104 bags) and part of the third (namely, 73 bags out of 181) had arrived in Bombay by the 2nd June in bags bearing China Devakaran's marks. On that day the second defendant, Virji Hunsraj, applied to the Railway Company for delivery, and paid full freight on all three consignments. He was allowed to remove the 56 bags and the 104 bags. After having done this, he loaded his carts with the 73 bags which had then arrived, out of the consignment of 181 bags, without any objection on the part of the Railway Company, but he was not allowed to take them out of the station-yard, and the 73 bags were consequently unloaded, and, together with the balance of the consignment of 181 bags which subsequently arrived, were retained by the Railway Company. The reason given by the company's servants for the detention was the receipt of a telegram, sent by the first defendant Hanmandás from Bijápur, on hearing of the dishonour of the *hundi* for Rs. 1,500, directing that the 181 bags should not be delivered. At the trial the Judge found that this telegram had probably been received before all of the 73 bags had been loaded into the carts.

Held, (1) that there was no such delivery of the 181 bags to China Devakaran's agent at Bijápur as to deprive the first defendant Hanmandás of his right of stoppage *in transitu*.

(2) That there was such a delivery of the 73 bags at the railway station to the second defendant Virji Hunsraj as to determine the first defendant's right of stoppage *in transitu*. It was to be assumed that the first defendant's telegram did not arrive in time to prevent the bags being placed, with the consent of the railway company, on the second defendant's carts; for it was not until the carts had been loaded that the company's servants interfered to prevent their leaving the station-yard. Before that time the freight for the 73 bags had been paid by the second defendant and the railway receipt had been given up to the company duly signed by the second defendant's servant. Everything had been done on the part of the company to divest themselves of their lien as carriers, for the mere fact that the carts were still standing

in the goods compound of the railway station after the bags had been placed on them could not affect the question, there being no suggestion that the matter as between the company and the second defendant had not been completely settled.

(3) That the railway receipts were not *instruments of title* within the meaning of section 103 of the Indian Contract (Act IX. of 1872), and that by endorsing and handing them over, the firm of China Devakaran did not assign them to the second defendant within the meaning of the said section.

CASE stated for the opinion of the High Court by W. E. Hart, Chief Judge.

1. This was an interpleader suit brought by the G. I. P. Railway Company to determine the question of title to 181 bags of wheat in their hands which the first defendant claimed to stop in transit, as the unpaid vendor of the insolvent consignee, and of which the second defendant claimed delivery as the holder of the railway receipt of the Southern Mahratta Railway Company for the goods endorsed to him by the consignee to secure an advance made on them.

2. These 181 bags formed one of three consignments of 56, 104, and 181 bags which were consigned by the first defendant at Bijápúr on the 28th and 29th May 1889 to the firm of China Devakaran in Bombay at the request of their agent in Bijápúr, on the understanding that the consignees were not to have the wheat till they had paid the *hundis* drawn in respect of it.

3. The *hundis* so drawn by China Devakaran's agent in Bijápúr in respect of these consignments were two in number, for Rs. 1,000 and Rs. 1,500 respectively, drawn on the firm of China Devakaran in Bombay and payable at sight, and were sent by the first defendant to his agent in Bombay for collection.

4. The former of these two *hundis* arrived in Bombay on 31st May and was paid on 1st June. The latter, which arrived here on the 1st June, was dishonoured on the 2nd by the firm of China Devakaran, who afterwards stopped business and filed a petition in insolvency.

5. On receiving these two *hundis* from China Devakaran's agent at Bijápúr the first defendant handed to him the three receipts of the Southern Mahratta Railway Company for the three consignments of 56, 104, and 181 bags which had been despatched by the first defendant's forwarding agent at the Bijápúr Railway Station.

1889.

THE G. I. P.
RAILWAY
COMPANY
vs.
HANMANDÁS
RAMKISON.

1889.

THE G. I. P.
RAILWAY
COMPANY
VS.
HANMANDÁS
RAMKISON.

6. The form of receipt in use by the Southern Mahratta Railway Company is somewhat peculiar, and differs from that used by the other and older railway companies in Bombay, especially in the notification printed in English and Maráthi at the foot of it. I would, therefore, solicit particular attention to the railway receipt for the 181 bags. The railway receipt was in the following form :

"SOUTHERN MAHRATTA RAILWAY.

Goods Receipt Note.

Bijápur Station, dated

Received from Hanmandás Ramkison the undermentioned goods :

Consignee.	Number of Articles.	Description.	Paid.
China Devakaran...	181	Bags of Wheat.	...

"This receipt must be produced by the consignee or the goods will not be delivered. If he does not himself attend he must endorse a request for delivery to the person to whom he wishes it made. If the consignment or this railway receipt is sold one or more times, the endorsement must be a distinct order to deliver to a certain person or firm, and this order must be on a one anna stamp. If more than one order appear on the face hereof, each order must bear a stamp.

" $\frac{I}{we}$ hereby certify that $\frac{I}{we}$ am are aware that the Southern Mahratta Railway Company has received the above mentioned goods subject to the conditions noted on the back, and that $\frac{I}{we}$ agree that it should receive them subject to these conditions.

"(Sender's Signature,)"

7. The three railway receipts mentioned in paragraph 5 were immediately sent by their agent at Bijápur to the firm of China Devakaran in Bombay, and by China Kanji, a member of that firm, were endorsed to the second defendant, to secure an advance of Rs. 2,000, on 31st May in the following form written across a one anna receipt stamp :

"Signature of China Devakaran. I have sold the delivery as per this receipt to Virji Hunsraj. The handwriting of China Kanji."

8. The consignments of 56 and 104 bags and 73 bags out of the consignment of 181 had all arrived in Bombay by 2nd June in bags bearing China Devakaran's marks into which they had been packed by the first defendant in his warehouse at Bijápur and some of which belonged to China Devakaran, while others had been purchased for them and debited to their account by the first defendant.

9. The second defendant applied to the Railway Company by his servant for delivery on 1st June and paid the full freight on all the three consignments. After some delay, owing to a mistake of his servant in regard to the signature of the delivery order at the foot of the plaintiffs' advice notes accompanying their bills for the freight, he was allowed to remove the 104 bags in carts hired by him on the second defendant's account of the carting agent at the Wári Bandar Goods Station, who is not a servant of the plaintiffs.

10. After the 104 bags had been so removed the second defendant's servant, without objection on the part of the plaintiffs, in like manner loaded into the carting agent's carts, with a view to their removal, the 73 bags which had then arrived out of the consignment of 181 bags. But, on his proceeding to sign a receipt for the delivery of these goods the plaintiffs' servants refused to allow him to do so, and without such receipt they would not issue the gate pass necessary to allow the carts to leave the station-yard with the 73 bags. These were accordingly unloaded, and, together with the balance of the consignment of 181 bags which subsequently arrived, were retained by the plaintiffs.

11. The reason given for this refusal on the part of the plaintiffs' servants was the receipt of a telegram despatched by the first defendant from Bijápur (on being apprised of the failure of China Devakaran to pay the *hundi* for Rs. 1,500) on the same 2nd June to the Goods Traffic Inspector at Wári Bandar in the following terms: "181 and 104 bags wheat marked 596 and 598. Don't deliver to China Devakaran till further intimation."

12. There was no proof of the exact time when this telegram was received by the Goods Traffic Inspector at Wári Bandar. I found, however, that he had certainly not received it before the 73 bags arrived at Wári Bandar, but had probably received it before they had been all loaded into the carts.

13. It is usual in Bombay among merchants engaged in the grain trade for railway receipts of the Southern Mahratta Railway Company to be endorsed by one holder to another, frequently many times, and each time upon a one-anna receipt stamp. These receipts so endorsed are considered as representing the goods and entitling the last endorsee to delivery to such an extent that many merchants

1889.

THE G. I. P.
RAILWAY
COMPANY
vs.
HANMANDÁS
RAMKISON.

1889.

THE G. I. P.
RAILWAY
COMPANY
vs.
HANMANDÁS
RAMKISON.

in Bombay advance money on them to the amount of several lákhs of rupees yearly.

14. On these facts I held, in regard to the first defendant's right of stoppage in transit under section 99 of the Indian Contract Act IX. of 1872—first, (on the authority of *James vs. Griffin*⁽¹⁾ and Benjamin on Sale, 4th edition, page 853) that there had not been such a delivery of possession of the 181 bags to China Devakaran's agent at Bijápur as disentitled the first defendant to exercise his right of stoppage in transit; and, secondly, that there had not been such a delivery of possession to the second defendant's servants at Wári Bandar as determined the first defendant's right of stoppage in transit in regard to the 73 bags. This ruling was based, having regard to the axiom enunciated in *Bethell vs. Clark*,⁽²⁾ that the Courts should favour the right of stoppage in transit (see also Benjamin on Sale, 4th edition, page 843), partly on the determination by the first defendant's telegram of the plaintiff's authority to deliver to China Devakaran, partly on the authority of the judgment of Scott, J., in the unreported case of *Haji Sher Mahomed vs. The B. B. and C. I. Railway Company*, and partly on the fact of the agreement between the first defendant and China Devakaran's agent at Bijápur that China Devakaran were not to have the goods till they had paid the *hundi*, as to which see remarks of Jessel, M.R., in *Merchant Banking Company of London vs. Phoenix Bessemer Steel Company*.⁽³⁾

15. I therefore considered the first defendant, as the unpaid vendor of the insolvent firm of China Devakaran on 2nd June 1889, had the right, under section 99 of the Indian Contract Act, to stop in transit the whole consignment of 181 bags as well as those then loaded into the carts at Wári Bandar Station as those which had not then arrived.

16. But this right of the first defendant I held to be subject to the right of the second defendant under section 103 of the Indian Contract Act, as I thought, having regard to *Merchant Banking Company of London vs. Phoenix Bessemer Steel Company*,⁽⁴⁾ and the remarks at pages 785 and 786 of the fourth edition of Benjamin on Sale, that a document in the form of the annexed receipt of the

(1) 2 M. & W. 633.

(2) L. R. 20 Q. B. D. 615.

(3) L. R. 5 Ch. D. 205 at page 219.

(4) L. R. 5 Ch. D. 205.

Southern Mahratta Railway Company with its endorsement, which the evidence shows to be so treated in the local usage of the grain trade, as I have pointed out in paragraph 13, was an instrument of title within the meaning of section 103 of the Indian Contract Act, and that by its endorsement and delivery to the second defendant under the circumstances herein set forth it had been sufficiently assigned within the meaning of that section.

17. It appeared that, after giving credit for the net proceeds realized by the sale of the 56 and 104 bags, there still remained a balance due to the second defendant in respect of his advance of Rs. 2,000 as a charge on the remaining consignment of 181 bags. I therefore held that the first defendant could, as against the second defendant, exercise his right of stoppage in transit as regards these bags only on payment of that balance.

18. Against this decision the first defendant desires to have a case stated for the opinion of the High Court on the questions:

(1) Whether the railway receipt of the Southern Mahratta Railway Company in the form annexed is, in the circumstances above set forth, an instrument of title within the meaning of section 103 of the Indian Contract Act?

(2) Whether by so endorsing and handing it over as aforesaid, the firm of China Devakaran assigned the said railway receipt to the second defendant within the meaning of the said section?

To these questions the second defendant desires to add—

(3) Whether the facts above set forth show such a delivery of the 181 bags to China Devakaran's agent at Bijápur as to deprive the first defendant of his right of stoppage in transit?

(4) Whether there was such a delivery of the 73 bags to the second defendant's servant at Wári Bandar as determined the right, if any, of the first defendant to stop the same in transit?

Lang for Hanmandas Ramkison.

Inverarity for Virji Hunsraj.

JUDGMENT OF THE HIGH COURT (Sir C. Sargent, C.J.,
and Bayley, J.)

The facts out of which this reference by the Chief Judge of the Small Cause Court arises are fully set out in the case stated by

1889.

THE G. I. P.
RAILWAY
COMPANY
vs.
HANMANDAS
RAMKISON.

1889.

THE G. I. P.
RAILWAY
COMPANY
vs.
HANNUNDA'S
RAMFISON.

the Court. With respect to the third question, whether there was such a delivery to China Devakaran's agent at Bijapur as to deprive the first defendant of his right of stoppage, we agree with the Chief Judge that it must be answered in the negative. There was no actual delivery to the agent of that firm at Bijapur, and the wheat therefore remained *in transitu* in the hands of the Railway Company until delivery to the consignee. See *James vs. Griffin*,⁽¹⁾ where Parke, B., says: "The vendor has a right if unpaid, and if the vendee be insolvent, to retake the goods before they are actually delivered to the vendee, or some one whom he means to be his agent, to take possession and keep the goods for him." It is clear, therefore, that whether the first defendant be regarded as a factor or *quasi* vendor, he was entitled to stop the 73 bags before they were delivered by the company in Bombay (*Feise vs. Wray*,⁽²⁾ and *Ireland vs. Livingston*⁽³⁾).

With respect to the fourth question, we think there was such a delivery of the 73 bags at the Wari Bandar to the second defendant's servants as to determine the first defendant's right of stoppage *in transitu*. Section 105 of the Contract Act provides that the notice by the vendor to the carrier to stop the goods must be given to the principal in possession at such time and under such circumstances that the principal by the exercise of reasonable diligence may communicate it to his servant in time to prevent a delivery to the buyer. It is left in doubt by the case whether the goods traffic inspector received the first defendant's telegram before all the 73 bags had been placed on the carts; but in any case we must assume that it did not arrive in time to prevent the bags being placed with the consent of the railway officials on the second defendant's carts hired for the purpose, for it is plain that it was not till the loading of the carts had been completed that the company's servants interfered to prevent the second defendant's servant from removing the carts from the railway compound. Before that the freight for these 73 bags had been paid by the second defendant's servant to the company, and the railway receipt had also been given up to the company duly signed by the second defendant's servant. Mr. Justice Bayley says in *Crawshay vs. Eades*⁽⁴⁾: "In order to divest the consignor's right to stop *in transitu*, there ought to be

(1) 2 M. & W. 623 at page 632.

(3) L. R. 5 H. L. 395.

(2) 3 East, 93.

(4) 1 B. & C. 111 at page 184.

such a delivery to the consignee as to divest the carrier's lien." Here everything had been done on the part of the company to divest themselves of their lien; for the mere fact that the second defendant's carts were still standing in the goods compound after the bags had been placed on them cannot, in our opinion, affect the question, there being no suggestion that the matter as between the company and the second defendant had not been completely settled. It is true the 73 bags formed a part of the consignment of 181 bags, but the rest of the 181 bags had not arrived—a circumstance which distinguishes the case from *Crawshay vs. Eades*,⁽¹⁾ where the Court held that the delivery was in course of proceeding, and that there was therefore no such delivery of a portion of the goods as to deprive the vendor of his lien even as to them. After what had occurred the company could no more refuse, in the interest of the first defendant, to let the carts leave their premises than the carrier in *Bird vs. Brown*⁽²⁾ had the right to refuse to deliver the goods to the purchaser. In that case the Court says: "The goods had then arrived at Liverpool and were ready to be delivered to the parties entitled. Bird on behalf of the assignees of the consignees demanded the goods and tendered the amount due for the freight. Assuming that there had been no previous stoppage *in transitu* the masters of the several ships were thereupon bound to deliver up the goods to Bird, and they could not by their wrongful detainer of them and delivering them over to other parties prolong the *transitus* and so extend the period during which stoppage might be made. The *transitus* was at an end when the goods had reached the port of destination and when the consignees having demanded the goods and tendered the amount of the freight, would have taken them into their possession but for a wrongful delivery of them to other parties.

It remains to consider the first and second questions as to the effect of the endorsement and delivery by the firm of China Devakaran of the railway receipts to the second defendant as regards the remainder of the 181 bags. In *Trikam Panachand vs. B. B. & C. I. Railway Company*, Mr. Justice Farran held that the railway receipts in that case which are in the same form as those which are issued by the G. I. P. Railway Company were not documents of

1880.

THE G. I. P.
RAILWAY
COMPANY
VS.
HANMANDAS
RAMKISON.

(1) 1 B. & C. 181.

(2) 4 Ex. 786 at page 797.

1889.

THE G. I. P.
RAILWAY
COMPANY
vs.
HANMANDÁS
RAMKISON.

title, being in form simple receipts with a notification that the company reserve the right of delivering the goods without the production of the receipts and therefore not distinguishable from wharfingers' certificates and mates' receipts, which were held not to be documents of title in *Gunn vs. Blocklow Vaughan & Company*⁽¹⁾ and *Hathesing vs. Laing*; *Laing vs. Zeden*⁽²⁾. However, in *Chunilal Jodraj vs. The G. I. P. Railway Company*, the same learned Judge had under consideration a railway document signed by the Rajputana-Málwa Railway officials in the same form as that of the present goods receipts note, and which is, we are informed, the one in use on all the State Railways and is somewhat differently worded from the goods receipt in the former cases. It runs thus :

"Received from the consignor the undermentioned goods for conveyance to Carnac Bandar Station by goods train. Consignee—China Devakaran. Description—181 bags of wheat. This receipt must be produced by the consignee or the goods will not be delivered; if he does not himself attend, he must endorse a request for delivery to the person to whom he wishes it made. If the consignment of this railway receipt is sold one or more times, the endorsement must be a distinct order to deliver to a certain person or firm, and this order must be on a one anna stamp. If more than one order appear on the face hereof, each order must bear a stamp. For conditions of contract see back.

Signature ()."

The learned Judge expressed the inclination of his opinion that such goods receipts were instruments of title within the contemplation of section 103 of the Contract Act, but added that he did not intend to decide the question whether he should have held them to be such without some evidence that they were so treated by merchants and the trade, as he had come to a conclusion on another part of the case which made it unnecessary for him to do so.

There can be no doubt, we think, that such a document, if endorsed, would not have been treated in the English courts as a document or instrument of title to exclude the vendor's right of stoppage *in transitu*, when the Contract Act came into force in September 1872. The decision of the Exchequer Court in 1846 in *Farina vs. Home*⁽³⁾ was then in force, by which a delivery warrant signed by a wharfinger, whereby the goods were made deliverable to the plaintiff "or his assignee by endorsement," was

(1) L. R. 10 Ch. App. 491.

(2) L. R. 17 Eq. 92.

(3) 16 M. & W. 119.

held to be "no more than a token of authority to receive possession" (Blackburn on Sales, page 297), or as Mr. Baron Parke states it: "Only an engagement by the wharfinger to deliver to the consignee, or any one he may appoint, and that until the wharfinger has attorned to the assignee and agreed with him to hold for him there was no constructive delivery to the assignee." That decision was never overruled, and authoritatively determined the legal effect of such documents, at any rate until the passing of the Factors' Act of 1877 (40 and 41 Vic. c. 39).

The language of the goods receipts in question scarcely affords so strong an indication of an authority to the assignee by endorsement to receive the goods as that of the document before the Court of Exchequer, and the document, therefore, is in no higher degree "a symbol of the goods" so as to exclude the right of stoppage than the wharfinger's certificate in the above case. It may be that both of them would have that character by virtue of section 5 of the English Factors' Act of 1877, which, as pointed out in Benjamin on Sale (4th edition), page 708, assimilates all documents of title as defined by section 4 of the previous Factors' Act 5 and 6 Vic. c. 39, to bills of lading for the purposes of defeating the right of stoppage. But that Act has not been extended to India. In *Trikam vs. Bombay Baroda and Central India Railway Company*, Mr. Justice Farran seems to have thought that in the absence of any definition of a document of title in the Contract Act itself, section 4 of Act XX. of 1844 (by which the English Factors' Act 5 and 6 Vic. c. 39 was extended to India) might be properly accepted as a guide to the meaning of the expressions "document showing title to goods" or "instruments of title to goods" in sections 108 and 103 of the Contract Act; but it appears to us that, however much that definition might assist in construing the expression "document showing title" in section 108 of the Contract Act, which was virtually substituted for the Factors' Act, and is *in pari materia*, it cannot properly be used in construing the expression "instrument of title" in section 103, which relates to an entirely different subject-matter from the Factors' Act, and that it is, therefore, more reasonable to presume that, in a matter of such general commercial importance, the framers of the Contract Act intended to

1889.

THE G. I. P.
RAILWAY
COMPANY
VS.
HANMANDAS
RAMKISON.

1889.

THE G. I. P.
RAILWAY
COMPANY
vs.
HANMANDAS
RAMKISON.

leave the term "instrument of title" in section 103 to be construed with reference to the decisions then in force in the English courts. The case of the *Merchant Banking Company of London vs. Phoenix Bessemer Steel Company*,⁽¹⁾ which was decided before that Act came into force, was referred to as bearing on the question. There, doubtless the Master of the Rolls, Sir G. Jessel, decided against the right of stoppage, but it was on special grounds (see page 217) —first, on account of the general custom of the iron trade, and secondly, because he thought he ought to impute to the vendor's special notice and special knowledge that the warrant was intended to be used for the purpose of raising money on it, and having that knowledge they issued the document in that particular form. In conclusion he adds: "The vendors purposely issued a second document of title with a view of its being used for a special purpose." In the present case no custom has been proved, and there are no special circumstances from which the intention could be inferred that the "goods receipt" should be used for pledging the bags.

We must, therefore, answer the first and second questions in the negative. If this be thought by the commercial community to be an unsatisfactory state of the law, it will be necessary, in our opinion, that the desired change should be made by the Legislature.

Costs of this reference to be costs in the case.

Attorney for first defendant—*D. S. Garud*.

Attorneys for second defendant—*Chalk, Walker, and Smetkam*.

1890.

July 4.

MULJI GOVINDJI, PLAINTIFF, versus NATHUBHAI HIRACHAND,
DEFENDANT.*

Contract—Assignment of contract—Suit by assignee of contract for damages for non-delivery—Plea that assignment of contract was a sham—Sham assignment—Fraud—Right of third party to question bona fides of assignment—Demand for delivery—Contract Act IX. of 1872, section 93.

On the 25th December 1886 the defendant contracted to deliver to the plaintiff on the 26th May 1887 one hundred bales of cotton at Rs. 196 per khandi. On the 28th February 1887 the plaintiff assigned this contract to one Khorsi Khetsi, and a few

(1) L. R. 5 Ch. D. 205.

* Reported at L. L. R. 15 Bom. 1.

days afterwards, namely 7th March 1887, he became insolvent. In his schedule there was no mention of this contract or its assignment or of the receipt of any consideration for the assignment. Khorsi Khetsi, as the beneficial assignee of the contract, subsequently called on the defendant to give delivery of the goods and offered payment of the price, but the defendant, who was then aware of the plaintiff's insolvency, refused, on the ground that Khorsi Khetsi was not a *bond fide* assignee of the contract for value, that the assignment was a sham, and was not intended to pass the beneficial interest in the contract. A suit was then brought against the defendant by Khorsi Khetsi claiming damages for breach of the contract. This suit was dismissed on the ground that the assignment of the contract was fraudulent. The plaintiff knew of the dismissal of Khorsi Khetsi's suit in 1887, but had never himself made any demand on the defendant for the performance of the contract. On the 6th November 1889 the plaintiff's petition in insolvency was dismissed for non-prosecution, and on the 18th November 1889 Khorsi Khetsi re-assigned the contract to the plaintiff. The plaintiff now sued the defendant to recover damages for breach of the contract. He contended that his assignment to Khorsi Khetsi, though in fraud of the Official Assignee and the creditors of the insolvency, was not in fraud of the defendant, and that by the dismissal of his petition the parties, as to their rights and liabilities under the contract, had been relegated to the position which they occupied prior to the plaintiff's insolvency.

Held, that the plaintiff was not entitled to recover damages from the defendant. There had been no demand for delivery by the plaintiff, or on his account, as required by section 93 of the Contract Act IX. of 1872. Khorsi Khetsi had asked for delivery as beneficial owner, but the property had not passed to him by the assignment, and although the defendant would be bound to recognize an assignee who could establish his title of full ownership in the contract, he was under no obligation to recognize Khorsi Khetsi when, as a fact, the beneficial interest in the contract still remained in the plaintiff, with whom the defendant had originally contracted.

In England, where there has been an assignment by deed, the assigned property passes by force of the deed, and it cannot be impeached at law by the assignor or by third parties other than creditors, on the ground of its not being a real transaction; but where the assignment is not by deed, the true nature of it as a sham may be proved. In India it is in all cases open to third parties to show that such was the case.

CASE stated for the opinion of the High Court by W. E. Hart, Chief Judge.

1. This suit was instituted on 1st April 1890 to recover from the defendant the sum of Rs. 756 as damages for the breach of a contract dated 25th December 1886 to deliver one hundred bales of good Bhavnagar cotton at the price of Rs. 196 per khandi on 26th May 1887.

2. When the case was called on for hearing before me on the 9th May 1890, the plaintiff's pleader, after stating the effect of

1890.

MULJI
GOVINDJI
vs.
NATHUBHAI
HIRACHAND.

1890.
—
MULJI
GOVINDJI
vs.
NATHUBHAI
HIRACHAND.

the contract as given above, stated the following additional facts in connection therewith. The contract in question was assigned by the plaintiff to one Khorsi Khetsi on the 28th February 1887. Almost immediately thereafter the plaintiff became insolvent, and on 7th March filed his petition and schedule in the Insolvent Court. On 6th November 1889 the petition was dismissed for non-prosecution by the plaintiff, and on 18th November 1889 Khorsi Khetsi re-assigned the contract to the plaintiff.

3. The defendant's attorneys then raised the following defences:

(a) The assignment to Khorsi Khetsi was fraudulent.

(b) The insolvency and subsequent conduct of the plaintiff amounted to an abandonment of the contract, which was acquiesced in by the defendant.

(c) Denial of breach by the defendant.

(d) The plaintiff was not ready and willing to perform his contract by paying for and taking delivery of the cotton on due date.

(e) Denial of damages.

Neither party asked to have any specific issue raised and determined on these defences.

4. The plaintiff's pleader in opening his case then read certain correspondence that had passed between Khorsi Khetsi and the defendant after the date of the plaintiff's insolvency and before the due date of the contract, from which it appeared that the former, as the beneficial assignee of the contract, had called on the latter to give him delivery under it, and offered payment of the price, but the defendant had refused on the ground that Khorsi Khetsi was not a *bonâ fide* assignee of the contract for value. The plaintiff's pleader then admitted that the assignment to Khorsi Khetsi was fraudulent, and had been so held by the late Second Judge of the Court, while acting as Chief Judge, in dismissing the suit No. 13043 of 1887 brought by Khorsi Khetsi as assignee of the contract against the defendant for damages by reason of its breach shortly after its due date. He also admitted that the defendant was aware of the plaintiff's insolvency when he received notice from Khorsi Khetsi to give delivery to him under the contract as the assignee; that there

was no mention in the plaintiff's schedule of the contract or its assignment, or the receipt of any consideration by the plaintiff from Khorsi Khetsi for the assignment; that the plaintiff had at no time subsequently sought to amend his schedule, or himself made any demand on the defendant to perform the contract, and that he knew, at the time, of the dismissal of Khorsi Khetsi's suit in 1887. But he contended that the assignment, though in fraud of the Official Assignee and the creditors of the insolvent, was not in fraud of the defendant, and that the parties by the dismissal of the plaintiff's petition had been relegated to the former position in regard to the rights and liabilities under the contract as obtaining prior to the date of the plaintiff's insolvency.

5. In disposing of the case so put before me on the facts above stated, I said there could be no doubt that the assignment by the plaintiff to Khorsi Khetsi was fraudulent, and, if so, it seemed to me that the reassignment by Khorsi Khetsi to the plaintiff was tainted with the same fraud and, therefore, the plaintiff's right to maintain this suit, which was based on that re-assignment, seemed to me to be founded on fraud. But, apart from this, I held that the plaintiff by reason of his insolvency was not ready and willing to perform his part of the contract on its due date, by himself, nor by his agent, inasmuch as Khorsi Khetsi's offer to perform it was not made as the agent of the plaintiff, but in his own right as the beneficial assignee of the contract. I also held that the conduct of the plaintiff had been such as justified the defendant in the belief that the plaintiff had abandoned his contract, and that in such belief he had likewise abandoned it, *Morgan vs. Bain*.⁽¹⁾ I therefore dismissed the suit and certified the defendant's professional costs Rs. 51.

6. The plaintiff's pleader then required me to state a case for the opinion of the High Court under section 69 of the Presidency Small Cause Courts Act XV. of 1882, and on my desiring to be informed of the points on which the opinion was to be asked, stated he would formulate the questions and submit them on the 14th instant. On that day, accordingly, he submitted the ten following questions, of which the fourth, fifth, sixth, and

1890.

MULJI
GOVIND
VS.
NATHUBHAI
HIRACHAND.

(1) L. R. 10 C. P. 15.

1890.

MULJI
GOVINDJI
vs.
KATHUBHAI
HIRACHAND.

seventh seem to me to be rather questions of fact than of law, and the ninth, moreover, to proceed on a misunderstanding of what my decision in fact was in regard to the third point mentioned in paragraph 5 above, while the tenth formed no part of his contention at the hearing, was not dealt with in my judgment, and was never indicated as one on which either my decision or the opinion of the High Court would be required. As, however, their Lordships in the recent case of *Sullemán vs. The New Oriental Bank Corporation* seemed inclined to put a somewhat wide construction on the section under which this reference is required by the plaintiff's pleader, I have thought it better, until the construction of that section is finally settled, to submit for their consideration all the questions desired by him exactly as they are proposed :

(1) Whether the Judge was correct in allowing the defendant to raise an issue as to whether the assignment by the plaintiff to Khorsi Khetsi of (*inter alia*) the contract sued on was fraudulent ?

(2) Whether the Judge ought not to have ruled that it was not open to the defendant, as a stranger to the transaction, to plead the fraudulent nature of such assignment ?

(3) Whether the Judge ought not to have held that the question whether such assignment was or was not tainted with fraud did not affect the plaintiff's right to recover against the defendant ?

(4) Whether the Judge was correct in holding that upon such facts as were admitted the said assignment was fraudulent ?

(5) Whether the Judge ought not to have held that the onus lay upon the defendant of proving that such assignment was fraudulent and that he had not discharged such onus ?

(6) Whether the Judge was correct in holding that the plaintiff was not ready and willing to pay and take delivery on due date ?

(7) Whether the Judge was correct in holding that the plaintiff had acquiesced in defendant's not delivering under the contract ?

(8) Whether the Judge ought not to have held that a sufficient demand for delivery of the goods and tender of cash, therefore, were respectively duly made, and that the defendant thereupon was bound to deliver the goods under the contract and answerable in damage for not so doing ?

(9) Whether the Judge ought not to have held that any further demand or tender was excused by the defendant's refusal to recognize Khorsi Khetsi?

(10) Whether the Judge ought not to have held that by the terms of the contract, providing that it should not be cancelled, the defendant was not, in any event, whether or not the said assignment was fraudulent or any demand or tender was made, bound to pay to the plaintiff the difference between the contract rate and the market rate on the 25th August 1887?

Lang for plaintiff.

Macpherson (Acting Advocate General) for defendant.

JUDGMENT OF THE HIGH COURT (Sir C. Sargent, C.J.,
and Bayley, J.)

We understand from the fourth paragraph of the case stated by the Judge of the Small Cause Court, and on examination of the proceedings in the Small Cause Court suit No. 13043 of 1887, that he found the assignment to Khorsi Khetsi to have been fraudulent in the sense of being a sham, and not intended to pass the beneficial interest, as explained in *Bowes vs. Foster*,⁽¹⁾ *Rajan Harji vs. Ardeshir Hormusji Wadia*,⁽²⁾ and the cases mentioned in the footnote. The cases of *Bessey vs. Windham*⁽³⁾ and *Phillpotts vs. Phillpotts*⁽⁴⁾ are doubtless English authorities that where there has been an assignment by deed, the assigned property passes by force of the deed, and it cannot be impeached at law by the assignor or by third parties other than creditors, on the ground of its not being a real transaction. But *Bowes vs. Foster*⁽¹⁾ shows that even in England, where the assignment is not by deed, the true nature of it as a sham transaction may be proved, and a long list of authorities in this Presidency, of which it is sufficient to cite *Rajan Harji vs. Ardeshir Hormusji Wadia*⁽²⁾ and the cases referred to in the footnote, establish that in this country it is in all cases open to third parties to show that such was the case.

Here the beneficial property in the contract has not passed to Khorsi Khetsi, and although the defendant would be probably bound to recognize an assignee who could establish his title of

(1) 2 H. & N. 779.

(2) I. L. R. 4 Bom. 76-77.

(3) 6 Q. B. 166.

(4) 10 C. B. 85.

1890.

MULJI
GOVINDJI
vs.
NATHUBHAI
HIRACHAND.

1890.

MULJI
GOVINDJI
P.,
NATHURAJ
HIRACHAND.

full ownership in the contract, no authority was cited to show that he was under an obligation to do so, if as a fact the property in the contract still remained in the person with whom the defendant had originally contracted. Further, as Khorsi Khetsi asked for delivery as beneficial owner and not on behalf of the plaintiff, there has been in fact no demand for delivery by the plaintiff, or on his account, as required by section 93 of the Contract Act IX. of 1872, which the defendant was bound to recognize.

We must, therefore, answer the eighth question in the negative. The first question must be answered in the affirmative, the term fraudulent being understood as above explained. The second and third questions on a similar understanding in the negative. The fourth, fifth, and sixth questions require no answer, as the fourth and sixth raise a question of fact, and as to the fifth the onus was not, as far as appears from the case, thrown on the plaintiff. The ninth must be answered in the negative. The seventh and tenth require no answer.

Costs of reference on the plaintiff.

Attorneys for plaintiff—*Conroy and Brown.*

Attorneys for defendant—*Chalk, Walker, and Smetham.*

1890.

July 4 &
Aug. 5.

SULLEMAN HUSSEIN, PLAINTIFF, versus THE NEW ORIENTAL
BANK CORPORATION, LIMITED, DEFENDANTS.*

Bill of Exchange—Drawer and drawee the same person—Forged endorsement of payee—Payment by drawee on forged endorsement—Liability of drawer—Ambiguous instrument—Election to treat it as a bill of exchange—Negotiable Instruments Act XXVI. of 1881, sections 6, 8, 17, 30, 32, 78, 85, 92—Review by High Court—Reversal of previous decision.

On the 29th April 1889 the plaintiff's brother-in-law, Mahomed Ebrahim, purchased from the defendants' branch at Mauritius a bill of exchange drawn on their Bank at Bombay payable on demand to the plaintiff's order in Bombay. The bill was in the following terms:

"THE NEW ORIENTAL BANK CORPORATION, LIMITED.

"Mauritius, 20th April 1889.

"On demand pay this first of exchange (second of same tenor and date being unpaid) to the order of Sullemán Hussein, six hundred and forty rupees, for value received. For the New Oriental Bank Corporation, Limited.

"To The New Oriental Bank Corporation Limited, Bombay."

* Reported at I. L. R. 15 Bom. 267.

Mahomed Ebrahim sent the bill by registered post to Bombay addressed to the plaintiff. During its transmission it was stolen. On the 14th May it was presented by some person to the defendants' Bank in Bombay bearing a forged endorsement in blank of the plaintiff, and it was paid by the Bank. The plaintiff as soon as he heard of the loss of the bill made inquiry at the Bank, and was told that the bill had been paid. On being shown the endorsement the plaintiff pronounced it to be forgery, and demanded payment of the bill, which the Bank refused. He thereupon filed this suit against the Bank as drawers of the bill.

Held, (1) That the document was an "ambiguous instrument" within the meaning of section 17 of the Negotiable Instruments Act (XXVI. of 1881), and that the plaintiff had elected to treat it as a bill of exchange. (2) That treating the document as a bill exchange, the defendants, as drawers, were discharged by the payment to the *de facto* holder who presented it for payment.

Where the point sought to be raised in review had not been raised or argued by either party, but was first taken by the Court itself in giving its opinion upon the case referred to it, the Court granted a review, observing as follows:—The question arising in this case is not a question merely between two parties, but is one of great general commercial importance, and under the circumstances and on the very special grounds I have mentioned, we think that the review ought to be granted.

THE plaintiff in this case sued the defendants in the Court of Small Causes at Bombay to recover the sum of Rs. 640. The claim was stated as follows:

Plaintiff seeks to recover from the defendants the amount due on a *hundi* or bill of exchange, No. 17, drawn by the defendant's Bank, payable to the plaintiff under date the 29th of April last, but though the said bill was overdue the defendants have failed to pay the same to the plaintiff.

In the alternative, plaintiff seeks to recover the amount of Rs. 640 payable to him under the said *hundi* or bill as on a count in trover for detaining the said bill and refusing to return it or pay the value thereof, and thus converting the same to their own use.

The facts were these. On the 23rd April 1889 one Mahomed Ebrahim purchased from the defendants' Bank at Mauritius a bill of exchange drawn by the Bank there on their Bank at Bombay, when it was made payable on demand to the order of the plaintiff. The following is a copy of the bill:

"Rs. 640.

"THE NEW ORIENTAL BANK CORPORATION, LIMITED.

"(Sd.) B. H. B.

29th April 1889.

No. 6/17.

"On demand pay this first of exchange (second of the same tenor and date being unpaid) to the order of Sullemán Hussein six hundred and forty rupees for value received. For the New Oriental Bank Corporation, Limited.

"Signature—Manager.

"Signature—Accountant Assistant.

"To the New Oriental Bank Corporation, Limited, Bombay."

During its transmission by post from Mauritius to the plaintiff

1890.
SULLEMÁN
HUSSEIN
ES.
THE NEW
ORIENTAL
BANK
CORPORATION.

1890.
 SULLEMÁN
 HUSSEIN
 vs.
 THE NEW
 ORIENTAL
 BANK
 CORPORATION.

in Bombay the bill was stolen, and on the 18th May 1889 it was presented by some person to the Bank in Bombay bearing a forged endorsement in blank of the plaintiff, and it was paid by the Bank. The plaintiff, as soon as he heard of the loss of the bill, made enquiry at the Bank, and was there informed that it had been paid. On being shown the endorsement he declared it to be a forgery, and he demanded payment of the bill, which was refused. He then brought this suit in the Small Cause Court.

The case came on for hearing before the Chief Judge on the 19th February 1890. The defence raised was that the bill was a cheque under section 6 of the Negotiable Instruments Act XXVI. of 1881, and being duly endorsed had been paid in due course, and the drawees were thereby discharged.

The Chief Judge, W. E. Hart, delivered the following judgment on the 24th February 1890 :

This is an action against the New Oriental Bank Corporation, Limited, a joint-stock corporation carrying on business in Bombay, Mauritius, and several other places. There is no dispute about the facts, which are as follows. The plaintiff's brother-in-law, one Mahomed Ebrahim, residing at Mauritius, on the 29th April 1889, there purchased of the defendants' company a bill of exchange for Rs. 640 drawn by themselves on themselves, and payable at Bombay to the order of the plaintiff on demand. This bill, which was stolen in the course of transit through the post to the plaintiff, was paid by the Bank in Bombay on the 18th May 1889, in the ordinary way, to a person presenting it for payment with a forged endorsement in blank of the plaintiff. As soon as the plaintiff was informed of his loss by a subsequent letter from his correspondent at Mauritius, he called at the Bank in Bombay, and was told the bill had already been paid. He then saw the endorsement and stated it was not in his handwriting, and demanded payment, which was refused. He accordingly brought this action against the corporation, serving the summons on their Manager in Bombay, who accepted service for the corporation, signing his name on the back of the summons on their behalf as manager.

No objection was taken to the form of the action, or the forum in which it was brought. Therefore, even if any were open to them, the defendants must be held to have waived and to have acquiesced in the institution of the suit, as contemplated by section 18 (c) of the Small Cause Courts Act. No collusion or fraud was alleged on the part of the plaintiff and Mahomed Ebrahim or either of them, nor was any negligence alleged on the part of the Bank in paying the bill. The only defence was that the payment of the bill having been made in due course, without notice of the loss or forgery, the defendants were discharged under the provisions of section 85 of the Negotiable Instruments Act, it being

contended that such a bill of exchange as the present falls within the definition of a cheque as given in section 6 of the same Act.

However that may be, it is clear that section 85 operates only to discharge as drawee. The present, however, is an action against the drawer, who would clearly be liable in such a case as the present, under section 78 of the Negotiable Instruments Act. It is true, that in this instance the drawer and the drawee were the same corporation, but the action is brought by the plaintiff as payee against the defendants as drawers, in which character alone they could be answerable to him on a demand draft such as this, they not having incurred any liability to him as drawees by acceptance. As it is clearly no answer to an action against the drawer to say that the drawee is not liable, and that is the only defence which has been attempted in the present case, my judgment must be for the plaintiff for Rs. 640 and costs.

The defendants applied to the High Court, and by order of the Appeal Court, dated 28th February 1890, a case was subsequently stated by the Chief Judge for the opinion of the High Court.

1. The bill of exchange was drawn on the 29th April 1889 by the defendants at Mauritius on themselves payable to the plaintiff's order on demand in Bombay, and was on the same day sold at Mauritius for Rs. 640 to the plaintiff's brother-in-law, who sent it by registered post to the plaintiff at Kathor. It was, however, stolen in transit; and a sheet of blank paper was substituted for it in the registered cover delivered to the plaintiff, who on receipt of it wrote to his brother-in-law, his only acquaintance at Mauritius, for an explanation. In reply he was informed of the particulars of the bill of exchange originally enclosed in the registered cover. With these he came to Bombay, and on enquiry at the defendants' bank was informed, as the fact was, that the bill had been paid on the 18th May 1889 on an endorsement in blank purporting to be that of the payee. On being shown this, the plaintiff pronounced it a forgery, and demanded payment as the payee named in the bill, which was refused. Neither party suggested any fraud, collusion, or negligence against the other, and I found that in making payment on the bill, the defendants had, in fact, made it to a person not authorized to receive it, and on an endorsement which was not that of the plaintiff, the payee named in the bill, but had acted, according to their usual practise, without negligence and without notice of the theft of the bill or the forgery of the endorsement.

2. The defence raised at the hearing was payment and satisfaction of the bill sued on, and the argument addressed to me on be-

1890.

SULLERMAN
HUSSEIN
vs.
THE NEW
ORIENTAL
BANK
CORPORATION.

1890.
SULLEMÁN
HUSSEIN
 vs.
THE NEW
ORIENTAL
BANK
CORPORATION.

half of the defendants proceeded solely on the theory that because the defendants were drawees of the bill they were discharged from their liability to the plaintiff by virtue of the provisions of section 85 of the Negotiable Instruments Act XXVI. of 1881. It was not suggested, nor did it occur to me, that such discharge of the drawees before the plaintiff was entitled to have recourse to the drawers would operate to prevent the liability of the latter ever attaching, so that there had, in fact, never been any cause of action against them.

3. I therefore held that as the defendants' liability to the plaintiff could only be that of drawers, it was not a sufficient answer to say that the drawees were not liable, and on the 24th February I passed judgment for the plaintiff for the amount claimed (Rs. 640) and costs (Rs. 49-5) and certified his professional costs (Rs. 51).

The Chief Judge then submitted for the opinion of their Lordships the following questions :

(1) Whether the drawees of the bill of exchange, the subject of this suit, are discharged under section 85 of the Negotiable Instruments Act XXVI. of 1881 by payment in due course ?

(2) If so, whether the defendants are liable under section 78 or under any other section of the Act last above named ?

The case came on for argument before the Appeal Court (Sargent, C.J., and Bayley, J.).

Macpherson for defendants.

Starling for plaintiff.

On the 4th July the High Court delivered its judgment on the questions referred. It was of opinion that the document in question was an ambiguous document within the meaning of section 17 of Act XXVI. of 1881, and that it was open to the plaintiff to ask the Court to treat it as a promissory note, *i. e.*, a promise by the defendants' Bank in Mauritius to pay in Bombay, and that in that case the Bank would not be discharged by section 78 as there had been no payment to the holder, *i. e.*, the person entitled to the possession, as defined in section 8. The answer to the first question was in the negative and to the second in the affirmative.

On the 25th July 1890 an application for a review of that decision was made on behalf of the defendants. One of the grounds for review set forth in the memorandum of review was the following: "That the said learned Judges ought to have held that the plaintiff had made his election, and treated the said instrument as a bill of exchange, and that the defendants were therefore discharged under section 85 of the Negotiable Instruments Act XXVI. of 1881 by payment thereof in due course."

On this ground the application was granted. In giving the decision of the Court allowing the review, the Chief Justice said: "The point which it is now desired to argue was not raised or argued by either party when the matter was last before the Court. It was, indeed, first alluded to by the Court itself in giving its opinion upon the case referred to it. The question arising in this case is not a question merely between two parties, but is one of great commercial importance, and under the circumstances and on the very special grounds I have mentioned, we think that the review ought to be granted."

The case was then argued on review.

Macpherson for defendants—Plaintiffs elected to treat the document as a bill of exchange, and not as a promissory note. Section 17 points to an election once for all.

[SARGENT, C.J.:—Does the fact of his calling the document a bill amount to an election so as to prevent him afterwards calling it a note?]

Yes. He indicates his election by saying so. In none of the proceedings in the Small Cause Court is there any suggestion of its being a note, nor when the case was argued here before the High Court. We say he elected to treat the document as a bill of exchange, and we hold him to his election; but if he has not done so, then we say he has made no election at all, and then the document is to be taken as what it appears *prima facie* to be, namely a bill of exchange.

[SARGENT, C.J.:—May he not elect now?]

He must begin *de novo*, and we shall be ready to meet him. But we say it is too late for him to elect now. No election can be made after we have paid the bill in due course. An election now would be to our prejudice. If the document is presented to us as

1890.

SULLEMÁN
HUSSFIN
vs.
THE NEW
ORIENTAL
BANK
CORPORATION.

1890.

SULLEMÁN
HUSSEIN
vs.
THE NEW
ORIENTAL
BANK
CORPORATION.

a bill of exchange (the plaintiff not having otherwise elected) and we pay it as such, then it is no longer open to him to elect. See section 10 as to payment according to *apparent* tenor. If it is a promissory note, it is a foreign note. See sections 11 and 12 of Act XXVI of 1881. Being a foreign note, the law of Mauritius applies, and we should have to prove the foreign law. See sections 134 and 137. The Code de Commerce (see Encyclopædia Britanica, p. 641 and p. 883) applies at Mauritius. See Code de Commerce, article, 145—187; Dictionnaire de Commerce, p. 1058.

Starling for plaintiff *contra*—In *Edis vs. Bury*⁽¹⁾ there was no express election, as in the present case. The document is not a cheque; so section 85 does not apply. A cheque is not drawn in duplicate, *Ramchurn Mullick vs. Lachmichand Radakissin*.⁽²⁾

JUDGMENT OF THE HIGH COURT (Sargent, C.J., and Bailey, J.)

In this case we granted a review of our judgment on the questions referred to us by the Chief Judge of the Small Cause Court on the ground that our decision in favour of the plaintiff was rested on a section of Act XXVI. of 1881, which had never been relied on by the plaintiff, nor had been the subject of argument before us at the hearing of the reference. In granting this review we acted upon the view taken by the Privy Council in *Gungapersad Sahu vs. Maharani Bibi*.⁽³⁾ The grounds of our previous decision were that the instrument sued on was an ambiguous instrument within the meaning of section 17 of the Negotiable Instruments Act XXVI. of 1881, and that the plaintiff could elect to treat it as a promissory note. With respect to the first proposition we thought, and are still of opinion, that having regard to the English law upon which the Indian Act, as Mr. Chalmers remarks in his notes on the Act, was passed, and more particularly to the case of *Miller vs. Thomson*,⁽⁴⁾ where the instrument was similar to the present one, and lastly to the fact that by the English Bills of Exchange Act, sections 5 and 73, such an instrument is treated as an ambiguous instrument, the instrument sued upon is one within the contemplation of section 17.

(1) 6 B. & C. 433.

(2) 9 Moore's P. C. C. 46 at page 69.

(3) L. R. 12 L. A. at page 51.

(4) 3 M. & G. 576.

It has, however, been now contended that in any case there could be no election after payment by the Bank in Bombay, and that even if it were otherwise, the plaintiff had already elected to treat the instrument sued on as a bill of exchange by the form of his summons and particulars and the issues raised at the hearing, and that no fresh election could therefore now be made. It is not necessary to consider the first objection, as we are of opinion that the second must prevail. The summons and particulars of claim which had not been alluded to in the first argument before us, and were not present to our minds when we answered the questions referred to us, show that the plaintiff treated the instrument as a bill of exchange drawn by the Oriental Bank at Mauritius on the same Bank at Bombay, and the statement of the Judge of the Small Cause Court further shows that the only question between the parties at the hearing was, whether the instrument was a bill of exchange as contended by the plaintiff or a cheque as contended by the defendants. It was, indeed, argued by Mr. Starling for the plaintiff that the plaintiff had previously elected to treat the instrument as a promissory note, because he had not given notice of dishonour, but it is plain that the omission to do so cannot be so regarded, as any such intention to elect to treat the instrument as a promissory note is rebutted by the subsequent pleadings in the case to which we have referred. The above remarks suffice to distinguish the case from *Miller vs. Thomson*,⁽¹⁾ where the plaintiff declared as on a promissory note and so excused himself for not having given notice of dishonour. We must, therefore, to arrive at a distinct conclusion on the question, which we left undecided, whether, treating the instrument as a bill of exchange, *i. e.* having regard to its terms as a cheque to which section 85 is applicable, the Bank as drawers of the instrument are discharged by payment to the *de facto* holder who presented it for payment. It is to be remarked that the language of the corresponding section 60 of the English Bills of Exchange Act of 1882 differs materially from that of section 85. The former provides that the payment by the banker shall be deemed to have been made

1890.

SULLEMÁN
HUSSEIN
VS.
THE NEW
ORIENTAL
BANK
CORPORATION.

(1) 3 M. & G. 576.

1890.

SULLEMÁN
HUSSEIN
vs.
THE NEW
ORIENTAL
BANK
CORPORATION.

in due course, which again by section 59 is declared to have the effect of discharging the bill, and, therefore, of preventing any further proceedings on it. But under section 85 (which is found in a chapter dealing with the discharge of drawers and drawees respectively) the drawee only is stated to be discharged, and such discharge would not of itself also discharge the drawer, as by section 37 the maker of a cheque is the principal debtor and not the surety. However, by section 30 the drawer of a bill of exchange or cheque is only bound to compensate the holder in case of dishonour by the drawee or acceptor, and by section 92, a promissory note, bill of exchange, or cheque is said to be dishonoured by non-payment when the maker of the note, acceptor of the bill, or drawee of the cheque makes default in payment upon being duly required to pay, that is (reading this section in connection with section 30) by the holder, who by the definition in section 8 must mean the *de jure* holder.

The question therefore is, whether the cheque was dishonoured when payment was required by the plaintiff and refused on the ground that it had already been paid to the *de facto* holder of the bill; and this must depend upon whether there was default in payment. "Default" is explained in Wharton's dictionary as "the omission of that which a man ought to do," and construing "default" in that sense, it may be said that, having regard to section 85, it was not the duty of the Bank as drawees, to pay the plaintiff when required to do so. This question is discussed by Cockburn, C.J., delivering the judgment of the Court of Appeal in *Charles vs. Blackwell*,⁽¹⁾ in construing the effect of section 19 of 16 and 17 Vic. cap. 59, which provides that a cheque payable to order on demand under the circumstances contemplated by section 85 of the Indian Act shall be a sufficient authority to the Bank to pay the amount of the draft to the bearer thereof. The Chief Justice says: "On refusing to pay it a second time the banker would not dishonour it. If the plaintiff should say 'Yes, you have paid it, but to one who has no title to the cheque,' the answer would be that it had been paid to one to whom the banker was authorized to pay it by operation

(1) L. B. 2 C. P. at page 159.

of the statute." Here the language of section 85 is different, but it may be said that the banker had presumable authority to pay, because by the terms of the section he is discharged if he pays it. By this course of reasoning the conclusion is arrived at that the bill was not dishonoured by the Bank's refusal to pay the plaintiff in Bombay, and therefore that the Bank as drawers are not liable. This conclusion is clearly the effect of the English Act, and we think it should be accepted. But it is to be regretted that on a question of so much importance to the commercial world the answer should not be found in an express provision but should be left to be inferred by a process of reasoning.

We must, therefore, answer the first question in the affirmative and the second in the negative.

Attorneys for appellants (defendants)—*Craigie, Lynch, and Owen.*

Attorneys for respondent (plaintiff)—*Chalk, Walker, and Smetham.*

1890.
SULLEMAN
HUSSEIN
vs.
THE NEW
ORIENTAL
BANK
CORPORATION.

RALLI BROTHERS, PLAINTIFFS, versus GOCULBHAJI MULCHAND,
DEFENDANT.*

1890.
Sept. 12.

Presidency Small Cause Courts Act (XV. of 1882), section 69—Case stated for opinion of High Court—Precise question of law or usage must be formulated—Practice—Procedure.

In a suit brought in the Small Cause Court by the plaintiffs against the defendant for damages from breach of contract to deliver goods, the only dispute was as to the principle on which the damages were to be assessed. The defendant paid into Court the sum of Rs. 779-10-0. At the close of the hearing and before judgment was delivered, the plaintiff's attorney informed the Chief Judge that he would require a case to be stated for the opinion of the High Court under section 69 of the Presidency Small Cause Courts Act (XV. of 1882), unless the decree were in his favour. The Judge thereupon desired him to state the exact question of law he would wish to be referred, but he declared himself unable to do so until after judgment was delivered. He said he could not then say anything more than that he would require a case to be stated for the opinion of the High Court on any question of law that might arise in the case. The Chief Judge thereupon stated the facts to the High Court, and referred the following general question for its opinion :

* Reported at I. L. R. 15 Bom. 376.

1890.

RALLI
BROTHERS
vs.
GOOULBHAI
MULCHUND.

"Whether on the facts above set forth the plaintiffs are entitled to recover from the defendant any, and if so what, sum greater than Rs. 779-10-0 paid into Court by the defendant." On the reference coming before the High Court, a preliminary objection was taken as to whether the reference was in proper form, no question of law or usage having the force of law having been formulated for the opinion of the Court.

Held (FARRAN, J., doubting), that the reference should be sent back to be amended by stating the precise question arising in the case.

In considering what damages a party who suffers from a breach of a contract is entitled to recover, two principles must be borne in mind: (1) that compensation only for the loss can be recovered, or, in other words, that the plaintiff is not entitled to make a profit out of the defendant's breach of contract; (2) that in estimating the loss the Court is entitled to take into account the loss sustained, which naturally arises in the usual course of things, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

So, where goods of the contract description were not available in the market at the due date of the contract, and the plaintiffs by purchasing superior goods, not to fulfil a contract, but to sell them again or to ship them as superior goods, made a distinct profit out of the defendant's failure to perform the contract,

Held, that they were not entitled to recover this profit from the defendant, but only the loss which they had actually sustained.

CASE stated for the opinion of the High Court under section 69 of the Presidency Small Cause Courts Act (XV. of 1882) by W. E. Hart, Chief Judge.

1. By a contract made subject to the rules of the Bombay Cotton Trade Association on the 21st September 1889, the defendant agreed to sell to the plaintiffs one hundred bales of new machine-ginned Broach cotton classed as "good," deliverable from 15th to 25th March 1890, for Rs. 231½ per khandi less 5½ per cent. discount.

2. The cotton, the subject of this contract, was part of a quantity of 3,200 bales of the same description delivered at the same time which the plaintiffs had purchased from different merchants for shipment to Europe, but they had not re-sold any of it by forward contracts in anticipation of its receipt.

3. Owing to an exceptionally good crop, none of the new Broach cotton arriving in Bombay up to 25th March was classed as "good." There was subsequently none of that quality and class offering for sale in the Bombay market at the due date of these contracts, a fact well known to the trade, and the sellers of all these 3,200 bales made default in the delivery of the cotton they had agreed to sell.

4. The defendant did send to the plaintiffs a delivery order on 25th March for the cotton he had agreed to sell to them, but as it reached them after noon on that day they declined to receive it. This they were entitled to do under rule 17 of the rules of the Bombay Cotton Trade Association, subject to which the contract had been made, which requires delivery to be offered before noon of the due date of a contract; and knowing, as they did, that there was not then in fact any cotton of the contract quality in Bombay, there was, in my opinion, nothing unreasonable in their insisting on the strict letter of the rule, and so avoiding having to go through the troublesome farce of presenting the delivery order and taking inspection of cotton which could not be exactly such as they had contracted to buy, and which the defendant has not attempted to prove was of a similar or superior quality.

5. On the same 25th March the Bombay Cotton Trade Association, according to their monthly practice, which has subsisted for the last fifteen months or thereabouts, published for the information of the trade, the rate, as ruling on that date, for new Broach cotton of "good classification" Rs. 248 per khandi. There is apparently nothing in the rules of that Association under which the present contract was made, obliging the parties to accept as binding on them the rate so published by the Association. But the plaintiff's firm is a member of that Association, and their assistant, Mr. Ward, who was their principal witness in the present suit, was a member of the committee of the Association, who by a majority of votes (Mr. Ward himself voting in the minority) fixed that as the ruling rate for 25th March. There being no cotton of this description then in Bombay, of course the rate so fixed was not determined by sales for actual delivery made in Bombay, but by reference to the rates at which contracts of re-sale were made in Bombay, by the purchasers to the sellers in settlement of contracts due on that day, in which default had been made in delivery by the original sellers, and to the prices at which sales were made in Bombay on that day on contracts for future delivery.

6. So far as the rate thus fixed for 25th March by the committee of the Bombay Cotton Trade Association depended on

1890.

BALLI
BROTHERS
VS.
GOOULBHAI
MULCHAND.

1890.

RALLI
BROTHERS
vs.
GOOULBHAI
MULCHUND.

the rates of the settlement contracts, it would appear to have been influenced in a great measure by the plaintiffs themselves. For Mr. Ward's evidence shows that for one month previously and up to and on 25th March they had been settling with all their other sellers, except the defendant, for all the 3,100 bales other than his one hundred, at the rate of Rs. 248 per khandi. At the same rate, too, Messrs. Volkart Brothers, who are also large exporters, settled contracts for the sale to them of cotton of the same description, to the amount of about Rs. 10,000.

7. However, on 25th March the plaintiffs purchased from Messrs. Gill & Company a small lot of one hundred bales of machine-ginned Broach cotton for ready delivery at Rs. 253 per khandi. This cotton was surveyed for the plaintiffs by Messrs. Glazebrook and Rowbotham on 27th March, the defendant being in no way party or privy to the survey, and was then classed as Rs. 6 off "fine," which is a decidedly superior class to the "good" which the defendant had contracted to deliver; as between the classes of "good" and "fine" come the class "fully good" and several other subdivisions.

8 I find that on 25th March this was the nearest quality of cotton to "good" of a superior description obtainable in Bombay. For though there was no evidence except that of the plaintiff's assistant on the subject, and he only spoke to this single sale on that day, the defendant offered no evidence at all to contradict or correct him on the point. The same surveyors, however, certified that on 25th March the rate for "fine" was Rs. 258, while Rs. 253 was that for "fully good," so that the real value according to the survey of this cotton on that day at Rs. 6 off "fine" would be Rs. 252 per khandi, not Rs. 253.

9. The purchase of these one hundred bales was not effected by the plaintiffs in order to enable them to perform any contract with a sub-vendee of the cotton contracted to be sold to them by the defendant, nor in any way to minimize the loss occasioned by his default. It is possible that this could have been better done by purchasing cotton of the contract quality in Broach, where possibly it was being held until the Bombay market should be cleared of the superior goods already sent, and bringing it to Bombay. But of this there was no evidence at all. The plain-

1890.
RALLI
BROTHERS
vs.
GOOULBHAI
MULCHAND.

tiffs purchased the one hundred bales of Messrs. Gill and Company simply for the purpose of making a market to ascertain the price in Bombay, at the contract date, of the cotton next better in quality to that to be supplied by the defendant which could then be got there.

10. These one hundred bales were eventually shipped by the plaintiffs for sale in Europe as about "fully good," a class superior to the "good" which the defendant had contracted to sell. There was no evidence of the price which they realized in Europe as about "fully good," but the presumption is that it was higher than would have been realized by the "good" cotton which the defendant contracted to sell had he supplied it.

11. Having so ascertained the price in Bombay on 25th March 1890 of the cotton then obtainable there next better in quality to that which the defendant had contracted to sell, the plaintiffs wrote on the same day to the defendant giving him notice that in consequence of his failure to deliver one hundred bales of good machine-ginned Broach cotton in terms of his contract they "invoice back the same at Rs. 253 per khandi, being the rate at which we have bought the nearest quality to 'good' obtainable in the market this day."

12. This has reference to the seventeenth of the rules of the Bombay Cotton Trade Association subject to which the contract between the parties was made. It provides that, in case of default by the sellers to deliver by noon on the due date, the buyer shall have the option of cancelling the contract, or of buying against it at the seller's risk in the market, or of invoicing back the goods to the seller at the market rate on the due date. I am clearly of opinion that this rule does not empower the plaintiffs either to invoice back the goods contracted to be sold to them at the price of other goods as they affect to do in this letter, or to buy in the market other goods than those contracted to be sold and charge the defendant with the difference as they claim to do in this suit. But neither, on the other hand, does it, in my opinion, restrict them to the options given by the rule; and if they are legally entitled, *dehors* the rule, to assess their damages as they have done at the difference between the contract price

1890.

RALLI
BROTHERS
vs.
GOCULBHAI
MULCHAND.

of the goods agreed to be sold and the market price of the next best quality obtainable in the Bombay market on the due date, I think there is nothing in the rule to prevent their so doing. I therefore held that this case was to be decided without further reference to the options given by that rule; and the parties would appear themselves to have been of the same opinion, for though the attorney of each without objection from the other read and commented on the seventeenth rule in support of his own contention, neither of them put it in evidence.

13. The defendant then replied on 27th March repudiating plaintiffs' claim. A correspondence ensued, which it is not necessary to consider at greater length than to say that each party throughout obstinately maintained his own view, the plaintiffs repeatedly insisting on their claim to charge the defendant with the difference between the contract price of one hundred bales of "good" Broach cotton and the price which they had paid for one hundred bales of the quality purchased by them from Messrs. Gill & Company on the due date, while the defendant insisted that he was not liable to pay more than the difference between the contract rate and the Rs. 248 which the Bombay Cotton Trade Association had fixed as the market rate of good Broach cotton on 25th March and payment of which he expressed himself willing to make.

14. At last on 12th April the defendant formally tendered to the plaintiffs' attorney the sum of Rs. 779-10-0, being the amount of damages for the breach of his contract assessed according to the rate last mentioned. The tender was refused, and this suit was filed on 12th May for Rs. 1,025-11-3, which represents the damages assessed according to the principle for which the plaintiffs contend, plus interest from the 1st April to 9th May, amounting to Rs. 9-13-3.

15. The defendant, admitting the contract and breach but disputing the amount of damages, has paid into Court as in full satisfaction of the plaintiffs' claim the sum of Rs. 779-10-0 already tendered before action.

16. At the conclusion of the hearing before me on 30th June Mr. Craigie for the plaintiffs said that he would require a case to be stated for the opinion of the High Court under section 69 of

the Presidency Small Cause Courts Act XV. of 1882 unless my decision were in his favour. I desired him to inform me of the exact question of law he would wish to be referred in such statement. But he declared himself unable to do so until after I should have delivered my judgment, and said he could not then say anything more explicit than that he would require a case to be stated for the opinion of the High Court on any question of law that might arise in the case. But inasmuch as the section under which I can be required to state a case for the opinion of the High Court, even if it be construed to mean that either party may at any time, whether before or after judgment, require the reference of any question of law existing in the case whether actually raised and decided or not, still expressly saves to me power of reserving judgment until after the decision of the reference. I have thought it better to do so in the present case, and as well in order that each party may be able at the hearing of the reference to raise any point he may wish, as because Mr. Craigie does not suggest in more explicit terms the question referred for the opinion of the High Court will be the general one whether, on the facts above set forth, the plaintiffs are entitled to recover from the defendant any, and if so what sum greater than Rs. 779-10-0 paid into Court by the defendant, and I reserve my judgment in the case until the receipt of the answer of the High Court to this question.

Macpherson (Acting Advocate General) for plaintiff.

Lang for defendant.

JUDGMENT OF THE HIGH COURT

SARGENT, C.J.—The preliminary question which arises on this reference made under section 69 of the Small Cause Court Act XV. of 1882 is whether the reference is in proper form, no question of law or usage having the force of law having been formulated for the opinion of this Court. That section contemplates a reference in two cases—first, where the Court consists of two or more Judges and they differ in their opinion “as to any question of law or usage having the force of law or the construction of a document,” and secondly, where the value of the suit exceeds Rs. 500, and such

1890.

RALLI
BROTHERS
VS.
GOOULBHAI
MULCHAND.

1890.

RALLI
BROTHERS
vs.
GOCULBHAI
MULCHAND.

question arises and either party wishes for the reference. The concluding clause of the section provides for the course to be adopted by the Court in both of the above cases: it is to draw up a statement for the opinion of the High Court of the facts of the case, and either postpone judgment or deliver judgment contingent upon such opinion.

It was pointed out that the language of this clause differs from that of section 7 of Act XXVI. of 1864, in that it directs "the statement of the facts of the case" to be referred, and not merely the "point arising in the case"; but the statement of facts must be deemed to be referred for the purpose of enabling the High Court to determine the question on which the Judges differ, as contemplated by the first clause of the section, or that "which arises in the suit," as contemplated by the second clause and which leads the party to ask for a reference. It is, therefore, for the party to formulate the question which is to set the Judge in motion. Such appears to me to be the plain and grammatical construction of the section which, to say the least, is strengthened by the circumstance that the statement is directed to be referred under section 617 of the Civil Procedure Code (Act XIV. of 1882) which expressly provides for particular questions being referred for the opinion of the High Court.

It is, however, suggested that the change in the language from that used in section 7 of Act XXVI. of 1864 shows that the intention of the Legislature was to make a party to require the Court to state the facts as a special case for the opinion of the High Court on the whole case as the parties by consent may do by section 25 of 3 and 4 Will. 4. c. 42, leaving it to the judgment of the Small Cause Court to say whether any point of law or construction of a document arises in the suit. I cannot but think that had such been the intention, different language would have been employed and that the two cases contemplated by the section would have been dealt with separately. I may add that the practice of this Court has always been in accordance with this view, and on enquiry I find that the same practice obtains in the Calcutta High Court, which always requires the particular question arising in the suit to be formulated and stated in the reference, but it is right to say that the present question under consideration has never been expressly raised before that Court. It

may be that it would be more convenient to the parties to be able to formulate the point of law after the Judge has delivered his judgment, but the language of the section is too clear to allow of that being done.

Before concluding, I wish to point out that in the case of *Sullemán Hussein vs. The New Oriental Bank Corporation, Limited*, page 267, which was referred to in the argument, the precise question was formulated in the reference, and the only doubt, and I admit there is one, which suggests itself on the case is whether the Court was right in granting a mandamus to the Small Cause Court Judge to refer a statement of facts. We ought, in my opinion, to send back this reference to be amended by stating the questions arising in the case, with liberty to the defendant to apply for costs in default of amendment.

FARRAN, J.—This reference and certain other references preceding it raise an important question as to the procedure to be followed by suitors in the Small Cause Court when desiring a reference to be made to the High Court under section 69 of the Presidency Small Cause Courts (XV. of 1882). That section provides that if in any suit, in which the amount of the subject-matter exceeds Rs. 500, any question of law or usage having the force of law or the construction of a document, which may affect the merits, arises, and either party so requires, “the Small Cause Court shall draw up a statement of the facts of the case, and refer such statement under section 617 of the Code of Civil Procedure (Act XIV. of 1882) for the opinion of the High Court, and shall either reserve judgment or give judgment contingent upon such opinion.”

Before proceeding to discuss the construction of the section, it will be convenient to refer to certain similar provisions which had been enacted before it was framed, and from which apparently its language was drawn. Section 7 of Act XXVI. of 1864 provided: “In any cause of an amount exceeding Rs. 500 the Judges of the said Courts of Small Causes shall reserve any question of law or equity, or any question as to the admission or rejection of any evidence as to which they shall entertain any doubts, or which they shall be requested by either party to the suit to reserve for the opinion of the High Court and shall give judgment contingent upon the

1890.

BALLI
BROTHERS
VS.
GOCULBHAI
MULCHAND.

1890.

RALLI
BROTHERS
vs.
GOCULBHAI
MULCHAND.

opinion of the said High Court on a case which they shall thereupon be entitled to state to the said Court. If only two Judges sit together and shall differ in opinion, the question on which they differ shall be so reserved."

It will be observed that according to that section what the Judges are to reserve is "any question of law or equity, or as to the admissibility of evidence," and for the purpose of raising such question the Judges are authorized to state a case, and the condition upon which they are to reserve such question are: (a) If they entertain any doubt upon it, (b) if they are requested by either party to reserve it, (c) if two Judges having it before them differ upon it. Act IX. of 1850 contained a somewhat similar section. Section 25 of Stat. 3 and 4 Will. 4. c. 12, which, I believe, is the foundation of the law relating to those special cases, enacted "that it should be lawful for the parties in any action, or information after issue joined, by consent and order of any of the Judges of the said superior Courts to state the facts of the case in the form of a special case for the opinion of the Court and to agree that judgment shall be entered," &c. By this provision the question of law was not eliminated from the facts, but the facts of the case were stated for the opinion of the Court. A similar provision is contained in Stat. 35 and 36 Vic. c. 86, for amending the law in certain inferior Courts. Section 527 of the Code of Civil Procedure (Act XIV. of 1882) similarly enables parties to state a case for the opinion of the High Court, but in such a case the exact question upon which such opinion is asked for is required to be stated. This section is not made applicable to the Small Cause Courts by their present Act XV. of 1882. When framing that Act the Legislature by section 23 made (amongst other parts of the Code of Civil Procedure) section 617 of the Code applicable to the Small Cause Court, and thus provided for the reference to the High Court of a question of law upon which the Court of Small Causes entertains reasonable doubt. Such a question is in that section called "a point upon which doubt is entertained," and the section provides that statement of the facts of the case and the point upon which doubt is entertained, with the Court's opinion upon the point, shall be referred for the decision of the High Court. The condition (a), upon which under its previous Act the Court of Small Causes was to refer a question of law, was thus provided for. It remained to provide for the

conditions (b) and (c), and the Legislature has done so by the section now under consideration. In framing that section the Legislature has departed from the wording of section 7 of Act XXVI. of 1864, and has used almost the same words as are used in Stat. 3 and 4 Will. 4 (under which the opinion of the Court was asked upon the law of the case generally) and identically the same words as are used in section 617 of the Code of Civil Procedure (Act XIV. of 1882) omitting the words "*and the point upon which doubt is entertained . . . with its opinion upon the point,*" and has followed the latter section in directing the statement to be referred for the opinion or decision of the High Court. The words in section 617 "*and the point upon which doubt is entertained*" are inapplicable to a Small Cause Court reference under section 69 of its Act, for that Court has to refer a case where a question of law arises, whether it entertains doubt upon the point or not (see per Wilson, J., in *Nicol vs. Mathuraddas Dumani*,⁽¹⁾ and the concluding words "*with its own opinion upon the point,*" are also inapplicable, for in the case of two Judges differing the Court cannot *ex hypothesi* form an opinion upon the question. The entire phrase which I have indicated is, therefore, left out, including the words "*and the point.*" It follows that it is not incumbent upon the Small Cause Court to formulate the exact point upon which the opinion of the High Court is required when submitting a statement of the facts of the case under section 69 of its Act.

It is, however, argued that the introduction into that section of the words "under section 617 of the Code of Civil Procedure" (Act XIV. of 1882) renders it necessary for the Small Cause Court to add the exact point for determination to its statement of facts. The only words which can, as I have shown, be possibly introduced into section 59 from section 617 of the Code are the words "*and the point.*" Cumbersome and embarrassing as the language of modern legislation often is (and the Act under consideration seems to me not to partake of either of these characteristics), it would appear to me to be beyond all belief cumbersome to insert the provision under section 617 of the Code of Civil Procedure in section 69 of the Small Cause Court Act, for purpose of introducing by reference the words "*and the point*" into the latter section. Besides, the statement of facts is not to be drawn up under section 617 of the Code, but such

1890.

RALLI
BROTHERS
vs.
GOCULBHAI
MULCHAND.

1890.

RALLI
BROTHERS
vs.
GOCULBHAI
MULCHAND.

statement when drawn up is to be referred under section 617 of the Code. The obvious meaning of this is that the reference to be sent up is to be dealt with by the High Court under section 617 and its dependent sections 618, 619, 620, and 621, in so far as the provisions of these sections are applicable to such a reference. Thus the costs of such a reference are to be dealt with under section 620 : *Nicol vs. Mathuradās Dumanī*.⁽¹⁾ The case may be sent back for amendment under section 621. Were it not for the provision "under section 617" these results would not follow. Abundant effect is in this way given to these words without convicting the Legislature of such peculiar drafting. Moreover, it is not imputing a violent change of intention to the Legislature if we hold that, in departing from the language of section 7 of Act XXVI. of 1864 in cases (b) and (c) they intended to follow in these instances the procedure under 3 and 4 Will. 4, c. 42, section 25, in not tying the Small Cause Court down to a statement of the exact point arising in the case, rather than to follow the procedure under the repealed section 7 of the Act. The difference in the procedure is, after all, one of form and not of substance. There is nothing in section 69 which prevents the Small Cause Court from stating the point for determination or getting the parties to formulate it. Moreover, if it is a particular point which the Small Cause Court requires enlightenment for its own guidance it has the power of stating a case raising such point under section 617 of the Code.

In coming to this conclusion, I feel the force of the argument of the Advocate General, that it is often impossible to formulate the exact point of law which arises in a case until after the facts are found, and to altogether exclude the parties from obtaining the opinion of the High Court upon a question which may arise only on the statement of facts when found, or which may for the first time be dealt with by the Court in its conditional judgment would, or might, work injustice. This would be the necessary result if the parties were under an obligation to formulate their point of law at the close of their case, for it appears to me that the party who requires the Small Cause Court to state a case must do so unconditionally before judgment is delivered. To require the Small Cause Court to deliver judgment and to state a case only in the

(1) I, L. R. 15 Calc. at page 509.

event of such judgment being adverse to the party requiring the case, would deprive the Court of the power of reserving judgment until after the opinion of the High Court is obtained, which power expressly is conferred upon it by the Act. The recent Oriental Bank case ⁽¹⁾ is an instance of a point taken in the judgment of the Small Cause Court which the parties had not raised before it and which the High Court felt itself competent to direct the Small Cause Court to raise upon a statement of facts and to decide. It appears to me to be impossible to reconcile the ruling of the High Court in that case with the argument that the parties are bound to formulate their question of law before the statement of facts is drawn up. There is certainly nothing in the Act which requires them to formulate it afterwards or indeed at all. Upon this interpretation of the section the procedure to be adopted is plain. Upon the trial of a case involving an amount of value of more than Rs. 500 if a question of law &c. arises, either of the parties or both can require a statement of the facts of the case to be drawn up for the opinion of the High Court. (I may here parenthetically observe that the fact that both parties may desire a case to be reserved, further supports my above view of the law. If they do not agree as to what the exact point of law is which is to be submitted or differ wholly on the subject, what is the Judge to do? The parties plainly in that case cannot formulate the point to be reserved.) This must be done unconditionally before or at the close of the case. The fact of a question of law arising is a condition precedent to the requisition for a case. The Judge upon considering the facts must determine whether a question of law is involved in them. It often happens that a point of law arises if the facts are found one way, while no question of law arises if they are found in the opposite sense. In that case the Judge cannot determine whether a question of law arises until he has formed a conclusion upon the facts. Assuming that the facts, as found, involve a question of law, the Judge, in pursuance of the requisition previously made to him, is bound to draw up a statement of facts for the opinion of the High Court, and either to reserve his judgment or give judgment contingent upon such opinion. He is not bound to state in the case

1890.
 RALLI
 BBOTHERS
 vs.
 GOCULBHAI
 MULCHAND.

(1) *Ante* page 252.

1890.

RALLI
BROTHERS
vs.
GOCULBHAI
MULCHAND.

the exact point of law which arises, but is bound before sending up a case for opinion to satisfy himself that the facts do raise a question of law. He will usually, according to the present practice, state what the questions of law are, either as they suggest themselves to himself or as the parties put them. It appears to me, however, that the parties are entitled to have the opinion of the High Court upon all questions which the facts found naturally give rise to. When the conditional judgment is in favour of a party who has asked for a case he will not require the case to be proceeded with; when it is against such party, section 70 precludes any delay on his part.

In this view, I think that this Court ought to give its opinion upon the special case submitted to it by the Chief Judge although he has not formulated the points for decision, as a question does arise upon it which may fairly be deemed to be a question of law, namely, what is the standard by which damages are to be calculated under circumstances similar to those which are set out in the case.

I am, however, ready, as this is a question of practice, to withdraw my judgment in favour of that which my Lord the Chief Justice, whose greater experience in a matter of this kind I readily submit to,—feeling that he is more likely to be correct in his views than myself—has pronounced. I accordingly do so.

The following order was made :

This Court doth return the said case for amendment, and doth direct that the Chief Judge of the said Court of Small Causes do state the precise question or questions of law upon which the Chief Judge or the plaintiffs desire to have the opinion of this Court, and the plaintiffs be at liberty to state the questions upon which they desire such opinion in the same way as if the hearing of the suit in the said Court of Small Causes had not been concluded, and that the Chief Judge do refer such questions accordingly.

In compliance with the above order the following questions were then submitted by the Chief Judge :

(1) Whether the plaintiffs were not entitled on the facts found to purchase on account of the defendant the cotton which they did purchase from Messrs. Gill and Company, and to recover the difference between the contract price of the cotton purchased by the plaintiffs from the defendant and the price of the cotton so purchased from Messrs. Gill and Company as aforesaid?

(2) If the answer to the above question should be in the negative,

whether the plaintiffs were not entitled on the facts found to recover from the defendant the difference between the contract price of the cotton purchased by the plaintiffs from the defendant and the market price of a similar quantity of cotton of the class next superior in quality to that contracted to be sold by the defendant to the plaintiffs which might be obtainable in the market?

(3) If the answer to the last question should be in the affirmative, whether on the facts found the market price of such cotton next superior in quality as aforesaid, must not, as a matter of law, be taken to be the price paid by the plaintiffs to Messrs. Gill and Company?

(4) Whether upon the facts found the correct measure of damages was as contended on behalf of the plaintiffs the difference between the contract price and the cotton purchase from Gill and Company?

JUDGMENT OF THE HIGH COURT (Sir C. Sargent, C.J., and
 Farran, J.)

In considering what damages a party who suffers from a breach of a contract is entitled to receive, two principles must be borne in mind :

(1) That compensation only for the loss can be recovered, or, in other words, that the plaintiff is not entitled to make a profit out of a defendant's breach of contract.

(2) That in estimating the loss the Court is entitled to take into account only the loss sustained, which naturally arises in the usual course of things, or which the parties knew when they made the contract to be likely to result from the breach of it. That is the law laid down in the Contract Act, section 73. In *Hume vs. Palmer*⁽¹⁾ both these elements were in the consideration of the Court when judgment was delivered. The plaintiff obtained no profit from the purchase he made. (1) This is especially pointed out by Field, J., pages 262 and 270; and (2) the parties knew when they made the contract that the goods were to be of a particular description not procurable in the market and that they were intended for export, and consequently they knew that the plaintiff, if he did not get the goods from the defendant, would be compelled to get goods like them else-

1890.
 BALLI
 BROTHERS
 vs.
 GOGULBHAI
 MULCHAND.

(1) L. R. 10 Q. B. 265.

1890.

RALLI
PROTHERS
vs.
GOCULBHAI
MULCHAND.

where. This is pointed out both by Blackburn and Field, JJ. In the present case the parties when they made the contract clearly did not contemplate that no new machine-ginned Broach cotton classed as "good" would be sent forward to Bombay in time to enable the defendants to procure it and complete his bargain. Thousands of bales of cotton of that description were being bought and sold for future delivery by the plaintiffs and others when the contract in question was made.

The plaintiffs by purchasing superior goods, not to fulfil a contract, but to sell them again, or to ship them as superior goods, made a distinct profit out of the defendant's failure to perform the contract. This profit they are not entitled to recover from the defendant, but only the loss which they have actually sustained, which is the difference between the contract price of the goods and the higher price at which the plaintiffs could have sold them at the due date of the contract; in other words, the market value of them at that date. The market value must be not the market value of superior goods, but the market value of goods of the contract description. At that date the plaintiffs were themselves selling back to their vendors large quantities of cotton of the contract description, at the rate of Rs. 248 per khandi, though the cotton itself had not actually come forward; and other large merchants were doing the same. That appears to us to be very excellent evidence of the price at which this class of cotton would have been sold in Bombay if it had been sent forward on the due date of the contract. It thus determines the market rate on that day. The plaintiffs, under rule 17 of the Cotton Trade Association (under the rules of which the contract in question was made) have invoiced back the cotton to the plaintiff, not at the market rate of cotton of the contract description, but at the market rate of superior cotton. This they were not entitled to do. They can only be allowed to recover the difference between the contract price and the market rate at the date of breach, namely Rs. 248 per khandi.

We accordingly answer the question in the above sense. The costs will be costs in the reference.

Attorneys for plaintiffs—*Craigie, Lynch, and Owen.*

Attorneys for defendant—*Conroy and Brown.*

L. N. BANAJI, RECEIVER OF THE ESTATE OF NUR MAHOMED
HAJI RAHIMTULA, DECEASED, PLAINTIFF, VERSUS
SYED HAJI ABDUL SAHEB, DEFENDANT.

1890.
Sept. 16.
—

Receiver appointed under Civil Procedure Code, section 503 — Powers of — Certificate under Act VII. of 1889, section 4—Suit filed by Receiver appointed by High Court.

The plaintiff filed suits in the Small Cause Court to recover money due to the estate of one Nur Mahomed Haji Rahimtula, deceased. He was appointed Receiver under a decretal order of the High Court in a certain administration suit. His right to sue, as such, was objected to, on the ground that the order was passed in derogation of the provisions of section 4 of Act VII. of 1889.

Held, that a certificate under section 4 of Act VII. of 1889 was not necessary in such a case. That section was not intended to apply to a Receiver appointed to take charge of property under section 503 of the Code of Civil Procedure. *Held* also, that such decision was in accordance with the practice obtaining in the Probate Division of the High Court of Justice in England.

CASE stated for the opinion of the High Court under section 69 of the Presidency Small Cause Courts Act (XV. of 1882) by W. E. Hart, Chief Judge.

1. This was one of several suits instituted in this Court by the plaintiff on 11th October 1889 as Receiver of the estate of the deceased abovenamed appointed by a decretal order of the High Court made on 10th January 1889, in a creditor's administration suit (No. 144 of 1888), wherein Haji Mahomed Haji Ismail and another were plaintiffs and Zulikhan Bai and others were defendants, and whereby the plaintiff was also appointed a special commissioner for the purpose of taking the accounts of the estate to be administered.

2. The present suit having been called on before me on 14th April 1890 was adjourned for the issue of a commission to take evidence at Secunderabad. On the next suit by the same plaintiff in the same character (No. 27749 of 1889) being called for trial on the same day, the same pleader appeared for the defendant as had represented the defendant in this suit (No. 27748), and stated that one of the defences he intended to raise was common to both suits, as well as to several others by the same plaintiff, in which he was engaged on behalf of the defendants, namely that the plaintiff had no title to sue. In support of this defence he relied on section 4 of the Succession Certificate Act (VII. of 1889) which came into force on 1st May 1889, and contended that the section (503) of the Civil Procedure Code, in virtue of which the High Court had appointed

1890.

L. N. BANAJI
vs.
SYED HAJI
ABDUL
SAHEB.

the plaintiff Receiver of the estate of the deceased, gave no power to authorize him to sue for the recovery of such debts as were not voluntarily paid to him, and that the decretal order appointing him in fact did not so authorize him.

3. The plaintiff's pleader contended that the decretal order of the High Court appointing the Receiver to collect the outstandings due to the estate of the deceased necessarily implied a power to him to sue for their recovery. As, however, I could not find any words expressly conferring such a power in the order, I adjourned the hearing till 20th June 1890 to enable the plaintiff to obtain letters of administration to the estate of the deceased or such amendment of the order of the High Court of 10th January 1889 as he might be advised.

4. At the adjourned hearing on 20th June 1890 the plaintiff's pleader produced a Judge's order, dated 26th September 1889, which was made in the abovementioned administration suit in the High Court. (No. 144 of 1888), but of the existence of which the plaintiff's pleader was not aware at the time of the first hearing before me, whereby the plaintiff, as such Receiver as aforesaid, was expressly authorized and empowered to file suits in this Court for the recovery of the outstandings due to the estate of the deceased. The plaintiff's pleader now contended that this order gave the plaintiff a sufficient title to sue without obtaining either letters of administration, or the amendment of the original decretal order, for the production of which he had taken the adjournment ordered on 14th April 1890.

5. The defendant's pleader still insisted on his first defence on the ground that the High Court had no power to make any order in derogation of the provisions of section 4 of Act VII. of 1889. I held that the Judge's order of 26th September 1889 on the face of it established the plaintiff's title to sue, and that it was not for me virtually to overrule the order of a superior Court on the ground that it had no jurisdiction to make an order, which, so far as I was concerned, it must be taken to have made with knowledge of the law as it existed at the time the order was made. I therefore overruled the first defence and directed the suit to proceed. The defendant's pleader then required me, under section 69 of Act XV. of 1882 (the suit being for the recovery of a sum greater than Rs. 500), to

state a case for the opinion of the High Court on the question raised by the first defence, namely whether the plaintiff is entitled to sue. I directed the defendant to deposit the amount of the claim and costs in Court, together with Rs. 50 to cover the costs of reference within a week, as a condition precedent to the statement of the case.

6. The defendant's pleader then stated that he would require a like reference in the other suit (No. 27748 of 1889) which, having been so adjourned for the issue of a Commission as in para. 2 above stated, was now on the same day's board for hearing. I therefore directed both suits to stand adjourned to the 27th June 1890 in order to allow of the deposit in Court being paid by whichever of the defendants desired to proceed with the reference, and in case of the deposit being paid by either defendant, both suits to abide the result of the reference, but in case of the deposit not being paid by either defendant, the hearing of both suits to proceed on the other defences. On 27th June 1890 the defendant's pleader informed me that the deposit had been paid in the suit first called on before me, No. 27748 of 1889. The present reference was therefore ordered to be made in the suit last mentioned, but the answers thereto govern the decision on the defence as to the plaintiff's title to sue in both the suits already specified, as well as the others by the same plaintiff which have not yet been called on for hearing.

7. The defendant's pleader then required me to state a further question for the opinion of the High Court, namely whether (assuming the plaintiff entitled to sue) this Court is competent to pass a decree against the defendant, who is a debtor of deceased person at the suit of a Receiver appointed by the High Court in a creditor's administration suit, without the production of letters of administration or a certificate under section 4 of Act VII. of 1889.

8. The plaintiff's pleader objected that the only question to be referred had already been argued, decided, and formulated on the 20th June, and that the adjournment to the 27th had only been taken for the purpose of the payment of the deposit, not for the raising of any additional question; that the second question did not, like the first, go to the root of the action; but, if found against the plaintiff would, at the most, only necessitate an adjournment till such time as he could produce the necessary letters of administration

1890.

L. N. BANAJI
vs.
SYED HAJI
ABDUL
SAHEB.

1890.

L. N. BANAJI
vs.
SYED HAJI
ABDUL
SAHEB.

or certificate; that it had not till then be raised or decided; and that its reference was premature until I had passed or attempted to pass a decree.

9. I had not then received the ruling of the High Court on a somewhat similar question in a reference from this Court made in obedience to an order of the High Court made under the Specific Relief Act in the case of *Suleman Hussien vs. The New Oriental Bank Corporation*⁽¹⁾; but from the newspaper report of that case, and what I had heard of the opinion expressed by their Lordships during the argument, I understood them to have held that a liberal construction must be given to the words of section 69 of the Presidency Small Cause Courts Act. With such a construction it seemed to me that the words of that section could be taken to mean that, provided the suit be for more than Rs. 500, either party may insist on having referred for the opinion of the High Court any question of law, no matter how trivial, that is capable of being raised in the case, no matter whether it be actually raised or not, either at the hearing or in the judgment, and that there is no limit of time within which this can be done, notwithstanding that the general policy of the Act, especially as declared by section 37, seems to be to assure speed and finality in the decisions of the Court. I therefore held that the defendant's pleader was not precluded from requiring me to state the second question abovementioned.

10. The plaintiff's pleader then required me to state also this third question: Whether the defendant can now raise the second question under the circumstances above set forth.

11. In regard to this question I would respectfully invite the attention of their Lordships, on the one hand, to the case of *Reg. vs. Brown*,⁽²⁾ and, on the other, to the *Queen vs. Clark*⁽³⁾ and *Pierpoint vs. Cartwright*,⁽⁴⁾ and to my remarks in paras 19 to 22 inclusive in the reference made at the same time as this in the case of *Byramji vs. Dulubram Motilal*, which for the sake of brevity I pray may be taken as incorporated in this reference. The suit last mentioned has been settled since I drafted the statement of the case in it for the opinion of the High Court. It will not therefore be before their Lordships.

(1) *Ante* page 259.

(2) L. R. 1 C. C. R. 54.

(3) L. R. 24 Q. B. D. 357.

(4) L. R. 5 C. P. D. 139.

JUDGMENT OF THE HIGH COURT (Sir C. Sargent, C.J.,
and Farran, J.)

1890.

L. N. BANAJI
vs.
SYED HAJI
ABDUL
SAHEB.

We do not think that a certificate under section 4 of Act VII. of 1889 was necessary in this case. The object why that Act was passed fully appears from the preamble of that Act. Section 4 of that Act does not seem to be intended to apply to a Receiver who is appointed to take charge of property under section 503 of the Code of Civil Procedure. Under that section the Receiver has the power to file suits. That section is not repealed or modified by the latter Act. A similar practice obtains in the Court of Probate in England.

We therefore answer the second question in the affirmative. Costs to be costs in the cause.

GOVERDHUNDA'S GOKULDA'S TEJPAL, APPELLANT, versus
THE MUNICIPAL COMMISSIONER FOR THE CITY OF
BOMBAY, RESPONDENT.

1890.

Nov. 28.

City of Bombay Municipal Act (III. of 1888) section 142 (2)—Halalkhor tax—Where leviable—Opinion of the Commissioner conclusive—Section 158 (2) "may" equivalent to "shall."

In the City of Bombay Municipal Act (III. of 1888) section 142 (2), the words "no such matter as aforesaid" mean excrementitious and polluted matter from privies, urinals, and cesspools only, and not all such matter generally. The opinion of the Commissioner as to the accumulation or deposit of such matter is conclusive.

In section 158 (2) of the same Act the word "may" must be read as equivalent to "shall."

CASE stated for the opinion of the High Court under Act XII. of 1888, section 2 (1), by W. E. Hart, Chief Judge.

1. This is an appeal to the Chief Judge under section 217 of the City of Bombay Municipal Act (III. of 1888) against the amount of the halalkhor tax and the general tax levied by the respondent on the premises of the appellant.

2. From the petition of appeal, it will be seen that the petitioner contends, first, that in regard to certain portions of his house property no halalkhor tax is leviable; second, that in regard to certain other portions three *per cent* only on the nett assessed value is leviable in respect of such tax; and third, that in regard to

1890.

GOVERDHUN-
DÁS GOKUL-
DÁS TEJPAL
vs.
MUNICIPAL
COMMISS-
SIONER OF
BOMBAY.

certain other portions he is entitled to a drawback of one-fifth of the general tax leviable in respect thereof.

3. At the hearing of the petition, the petitioner's attorney abandoned the second of the contentions above mentioned, and it remained for me to dispose of the petition on the first and third points only.

4. The halálkhor tax (section 140 (b) of the City of Bombay Municipal Act III. of 1888) has been levied on the petitioner's premises under section 142 (1) (a). It is admitted that these premises are situated in portions of the city in which the public notice contemplated in that clause has been given. But it is contended, in regard to those numbered 1, 4, 5, 6, and 8 in para. 1 of his petition, that the petitioner is exempt from the tax under the proviso contained in sub-section (2) of that section.

5. In his letter No. 15078 of 1889-90, dated 16th December 1889, the Commissioner declared his opinion that polluted and excrementitious matter must accumulate on the premises in question. By his attorney's letter dated 8th January 1890, the petitioner claimed that these premises were not liable to the halálkhor tax. In his reply No. 18884 of 1889-90, dated 8th February 1890, the Commissioner declared that the premises in question had either '*moris*' or urinals connected with a municipal drain, or had excrementitious or polluted matter accumulating or deposited in them, or the occupiers used a neighbouring water-closet, privy, or urinal, and accordingly declined to allow the exemption under the proviso in sub-section (2).

6. At the hearing of the petition, it was stated by the appellant's attorney, and not denied by the respondent's attorney, that the premises in respect of which the appellant claimed exemption from the halálkhor tax were one book-binder's shop and four godowns, only open during the day, and none of which were used as human habitations in the general sense of the term. It was contended that no excrementitious or polluted matter from privies, urinals, or cess-pools (for the removal of which only the halálkhor tax is leviable under section 140 (b) could accumulate or be deposited on any of them, and that, even if the Commissioner was of the contrary opinion, it was open to the appellant to show by evidence before me that such opinion was wrong. Further, it was contended that it was apparent from the Commissioner's letter that he was in fact of opinion

that on some at least of the premises excrementitious matter did not accumulate or become deposited, inasmuch as he states that the occupants of some (not specified by him), used adjacent privies &c., and if the appellant could show that this was case with all, that opinion must be held to have been expressed in regard to all the premises as the Commissioner had omitted to specify any in particular to which it was confined.

7. For the respondent it was contended that the Commissioner's remark in regard to the use of adjacent privies could apply only to excrementitious matter, and that, therefore, his opinion regarding the accumulation and deposit of polluted matter, *e. g.*, dirty water, refuse of food &c., still applied to all the premises in question, and that it was not open to me, having regard to the wording of section 142 (2), to go behind that opinion, or admit evidence to raise the question of its correctness.

8. The general tax (section 140 (c) of the City of Bombay Municipal Act (III. of 1888) has been levied on the petitioner's premises under section 143. It is not contended that any of them come within the exceptions specified in that section. But it is contended, in regard to those numbered 2, 3, 7, 11, 12, 13, 14, and 15 in para. 1 of his petition, that the petitioner is entitled to a drawback under section 158 (2).

9. These premises have been let to two or more persons holding in severalty, and the Commissioner has treated all the several holdings comprised within any one building as one property. No general conditions such as those contemplated in section 158 (2) have yet been prescribed by the Standing Committee. The practice of the Commissioner, therefore, in allowing the drawback of one-fifth of the general tax under section 158 (2) has been to allow it only in respect of such premises as fulfil the conditions prescribed in clause 2 of section 76 of the old Bombay Municipal Acts (III. of 1872 and IV. of 1878) (now repealed), and as the premises in question do not fulfil those conditions he has refused to allow the petitioner the drawback of one-fifth which he claims in respect of them.

10. It was contended on behalf of the petitioner that, inasmuch as it appears from section 158 (1) requiring the Commissioner to obtain the consent of the owner to such premises as those in question being treated as separate properties, that it was an advantage to the

1890.

G. VERDHUN-
DAS GOKUL-
DAS TEJPAL
vs.
MUNICIPAL
COMMISSIONER OF
BOMBAY.

1890.

GOVERDHUN-
DAS GOKUL-
DAS TEJPAL
vs.
MUNICIPAL
COMMISSIONER OF
BOMBAY.

owner to have them treated as one property, and it would be no advantage to him to have them so treated unless the drawback of one-fifth were allowed, inasmuch as he would then have no allowance for vacancies under section 174 unless the whole property were vacant, the word "may" in section 158 (2) should be construed "must." On behalf of the respondent it was contended that in the absence of general conditions prescribed by the Standing Committee this clause was permissive only, not mandatory, and that it was optional with the Commissioner to allow the drawback, which he did only in the case of premises fulfilling conditions not fulfilled by the petitioner's premises now in question.

11. On the question of the halalkhor tax, I found as a fact, from the correspondence and from the Commissioner having refused to allow the exemption under section 142 (2), and his having come into Court to resist the claim set up in his petition, that he was of opinion that excrementitious and polluted matter generally, and not from privies, urinals, and cesspools in particular, did accumulate or was deposited in all the premises of the petitioner, in respect of which he claimed exemption from the halalkhor tax. I was of opinion that the words "such matter" in section 142 (2) meant excrementitious and polluted matter generally, and I thought the corresponding opinion as to its accumulation and deposit was final in regard to the allowing of the exemption claimed.

12. On the question of the drawback of one-fifth of the general tax, I was of opinion that the word "may" in section 158 (2) was not equivalent to "shall," and that the clause was permissive only and not mandatory.

13. But inasmuch as I entertained reasonable doubts on the construction of the City of Bombay Municipal Act (III. of 1888), sections 142 and 158, I postponed my decision on the petition before me pending the receipt of the opinion of the High Court on the following questions :

(1) Is the opinion of the Commissioner contemplated in section 142 (2) conclusive on the question as to the fact of the accumulation or deposit of excrementitious or polluted matter in or upon any premises ?

(2) Are the words "such matter as aforesaid" in that clause to be construed as meaning excrementitious and polluted matter from

privies, urinals, and cesspools only, or excrementitious and polluted matter generally ?

(3) Is the word "may" in section 158 (2) to be construed as equivalent to "shall" ?

JUDGMENT OF THE HIGH COURT (delivered by Sir C. Sargent, C.J.)

It will be convenient to consider first the second question. As to this we think that clause (2) of section 142 must be construed as meaning excrementitious and polluted matter from privies, urinals, and cesspools only. The clause is a proviso to sub-clause (a) of clause (1), and is intended to relieve the owner of premises who would otherwise be liable under that sub-clause to pay the halálkhor tax, whether or not there was excrementitious and polluted matter from privies, urinals, and cesspools on the premises, for the removal and disposal of which the halálkhor tax was by section 140 authorised to be levied. It was but reasonable that, when there was "no such matter," the tax should not be levied. To hold that "such matter as aforesaid" included excrementitious and polluted matter generally would be to impose a tax indirectly on owners of premises, on which there might happen to be excrementitious and polluted matter, which the Municipality were not bound, and could not therefore be called upon, to remove. This, we think, would be a strained construction of the proviso when read, as it ought to be, in connection with the sub-clause (a) to which it applies.

As to the second question, the opinion of the Commissioner as to the accumulation or deposit of such matter as is contemplated by proviso (2) is conclusive.

The third question which arises under section 158 (2) presents more difficulty. The language of that sub-clause implies that the owner of the building derives some benefit from each of the several holdings comprised in it being treated by the Commissioner as a separate property, and section 175 expressly provides for a refund of two-thirds of the general tax, where a portion of a building treated as a separate property has remained vacant. It is, moreover, we think unlikely that it was intended to give discretion to the Commissioner, as it is not apparent upon what grounds it could be exercised, and might therefore be exercised capriciously. Upon the whole we think that "may" should be read as meaning "shall" in the above sub-clause (2) of section 158.

1890.

GOVERDHUN-
DÁS GOKUL-
DÁS TEJPAL
vs.
MUNICIPAL
COMMIS-
SIONER OF
BOMBAY.

1891.
Feby. 4.

SIVJI KARAMSI AND ANOTHER, PLAINTIFFS, versus CHARLES
ANTHONY BEYTS AND ANOTHER, DEFENDANTS.

*Contract for forward delivery—Delivery tendered by third party on behalf of one
of the contracting parties—Refusal to accept—Assignment of contract.*

In January and February 1890, the firm of Madhavji Ladha entered into two contracts for delivery to defendants of 150 tons of wheat of a certain description. The delivery was to be in April-May following. Madhavji Ladha's firm agreed to buy in their turn 150 tons wheat of the same description as that specified in their contracts with the defendants, and for the same delivery from the plaintiffs' firm of Sivji Pachu. Madhavji Ladha requested the plaintiffs to deliver the 150 tons wheat to the defendants, and requested the defendants to pay for and take delivery of the wheat which they had contracted to buy, from the plaintiffs' firm.

On defendants refusing to accept delivery from any persons other than the firm of Madhavji Ladha, with whom alone they had contracted, the firm of Madhavji Ladha assigned their two contracts with the defendants to the plaintiffs' firm, and authorised them to give delivery and recover the moneys due under the said contracts.

The plaintiffs' firm then tendered to the defendants on the 23rd May 1890 railway receipts for the full quantity of 150 tons wheat of the contract quality, and at the same time gave notice of the assignment. Defendants still refused acceptance of the tender. Plaintiffs sold the wheat and sued the defendants in damages.

Held, that the letter from Madhavji Ladha's firm to the defendants to take delivery from the plaintiffs amounted to an order to the defendants to take delivery of the wheat which they had contracted to buy, and to pay them the purchase-money. Compliance with that order would not have deprived the defendants of their remedy against the firm of Madhavji Ladha, had the wheat proved to be inferior to the contract quality.

Held also, that the subsequent assignment being merely of the benefit of the contract, the defendants could not object to take delivery of the goods, unless they could plead the custom of the trade as opposed to it, and no attempt was made to do this.

CASE stated for the opinion of the High Court by W. E. Hart, Chief Judge.

1. On 1st January 1890 the defendants contracted to buy from the firm of Madhavji Ladha 50 tons of white pissi wheat at Rs. 4-8-6 per cwt., deliverable at the buyer's godown or railway station, Bombay, in April and May 1890, of "fair average quality," containing 85 *per cent.* soft and 15 *per cent.* hard red, subject to a refraction of 4 *per cent.*, with usual allowance up to 6 *per cent.*, on payment of 90 *per cent.* on railway receipt or godown delivery.

2. On 4th February 1890 the defendants further contracted to buy from the same firm of Madhavji Ladha 100 tons of new ekdani pissi wheat at Rs. 4-0-7 per cwt., deliverable at the buyer's godown or railway station, Bombay, in April May 1890, of "fair average quality," subject to a refraction of 4 *per cent.*, with usual allowance

up to 6 per cent., on payment of 90 per cent. on railway receipt, containing 85 per cent. soft white and 15 per cent. hard red.

3. To enable them to perform these contracts with the defendants, the firm of Madhavji Ladha by a contract of 16th May 1890 purchased from the plaintiff's firm of Sivji Pachu 150 tons of new ekdani pissi wheat at Rs. 4-6-6 per cwt., deliverable at the buyer's godown or railway station, Bombay, in May 1890, of fair average quality, containing 85 per cent. soft white and 15 per cent. hard red, subject to a refraction of 4 per cent., with usual allowance up to 6 *per cent.*, on payment of 90 *per cent.*, against railway receipt or godown delivery. This contract specially provided that the wheat which formed the subject of it should be delivered to the defendants.

4. On 20th May 1890 the firm of Madhavji Ladha wrote to the defendants a Gujaráti letter, in which, after referring to their two contracts for the sale to the defendants of 150 tons of wheat, they informed the defendants that the full amount would be delivered to them by the firm of Sivji Pachu, to whom they requested the defendants to make payment at the rate mentioned in their contracts.

5. This letter was handed by the firm of Madhavji Ladha to the firm of Sivji Pachu, who enclosed it with a letter of their own to the defendants, dated 20th May 1890, in which they informed the defendants of their own contract with Madhavji Ladha to deliver 150 tons on their account to the defendants, and tendered railway receipts for 75 tons.

6. In reply, the defendants wrote a letter, dated 20th May 1890, declining to accept delivery of the 150 tons from any person other than Madhavji Ladha.

7. By this time the market price of wheat of the contract quality had fallen considerably and was still declining, and it was to the interest of the defendants if possible to avoid performance of their contracts with Madhavji Ladha. That this was the consideration which influenced the defendants in refusing to accept performance on behalf of Madhavji Ladha by the plaintiffs rather than any doubt as to the ability or inability of the latter, is clear from the facts (1) that they also refused to accept performance on the plaintiff's behalf by Messrs. Ralli Brothers, who are among the largest dealers in wheat and one of the wealthiest firms in Bombay; (2) that nowhere

1891.

SIVJI
KARAMSI
vs.
CHARLES
ANTHONY
BEYTS.

1891.

SIVJI
KARAMSI
vs.
CHARLES
ANTHONY
BRYTS.

throughout the correspondence do they allege the reason for refusing to accept delivery from the plaintiffs on account of Madhavji Ladha; (3) that eventually it was Madhavji Ladha, and not the plaintiffs, who became insolvent and unable to meet their engagements or offer to give any evidence at the hearing.

8. On the refusal of the defendants to accept any wheat tendered under their contracts with Madhavji Ladha by any person other than Madhavji Ladha themselves, the plaintiffs called on the firm of Madhavji Ladha either to take delivery themselves of 150 tons contracted to be delivered on their behalf to the defendants, or to assign their contracts with the latter to the plaintiffs. The firm of Madhavji Ladha adopted the latter alternative, and by indenture of 23rd May 1890 assigned all their right, title, and interest under their two contracts with the defendants and the full benefit and advantage of the same to the plaintiffs, to whom they also gave full power in their names or otherwise to call in and compel payment of money due under the contracts or otherwise to enforce lawful rights arising thereunder, and to give effectual releases and discharges for the same.

9. The plaintiffs then tendered, on 23rd May 1890, to the defendants railway receipts for the full quantity of 150 tons of wheat of the contract quality, and at the same time, through their attorneys, gave them notice of the assignment, and required them to take delivery and make payment in terms of their contracts, threatening in default to sell on their account, and hold them liable in damages, in which it will be seen there is no express waiver of the previous refusal by the defendants to accept delivery from the plaintiffs tendering on behalf of Madhavji Ladha, but on the contrary they are called on to receive delivery of the goods according to the custom of the trade.

10. To this notice the defendants sent a reply of the same date declining to take delivery of the wheat from the plaintiffs against their contracts with Madhavji Ladha.

11. The plaintiffs then sold the 150 tons of wheat at prices ranging from Rs. 4-4-4 to 4-4-6 per cwt., and after notice to the defendants brought this action, as the assignees of Madhavji Ladha's contracts with the defendant, to recover the difference between the prices so realized and the contract prices.

12. The plaintiffs' pleader in his reply stated that he did not contend there had been a breach by the defendants on 20th May 1890 of their contracts with Madhavji Ladha. The defendants' attorney then required me to draw up a statement of the facts of the case as above set forth and to refer the same for the opinion of the High Court on the following question :—Whether, in the circumstances herein appearing by virtue of the assignment of 23rd May 1890, the plaintiffs were entitled to require the defendants, and the defendants were bound, to accept delivery of the goods tendered by the plaintiffs to the defendants on that day ?

13. The defendants having deposited in this Court a sum sufficient to cover the amount of the plaintiff's claim and costs and Rs. 50 for the costs of this reference, I respectfully submit the statement and question as required by them and reserve my judgment pending the receipt of the opinion of the High Court.

JUDGMENT OF THE HIGH COURT.

The letter of 20th May 1890 from the firm of Madhavji Ladha to the defendants, handed to the defendants by the plaintiffs' firm with their letter of even date, amounted to an order to the defendants to take delivery of the wheat they had contracted to sell them from the plaintiffs' firm and to pay them the purchase-money. If the defendants had acted in compliance with these directions, it is plain they would not have lost their remedy against the firm of Madhavji Ladha had the wheat proved inferior to contract quality. But it was argued that by accepting the wheat from the plaintiff as assignees under the deed of assignment of the 23rd May 1890, the effect of it would have been to deprive the defendants of all right as against the firm with whom they contracted. That deed only purports to convey to the plaintiffs the full benefit and advantage of such contracts and contains no covenant on the part of the latter to hold the firm of Madhavji Ladha harmless. It virtually did no more than what was the legal effect of the two letters of the 20th May. We cannot doubt therefore that by acceptance of the wheat the defendants would not have been prejudiced in their rights against the firm of Madhavji Ladha. There would have been no novation on their part as they had never throughout the correspondence been required to accept the plaintiffs in the place of the defendants in re-

1891.
—
SIVJI
KARAMSI
vs.
CHARLES
ANTHONY
BREYTS.

1891.

SIVJI
KARAMSI
vs.
CHARLES
ANTHONY
BEY TS.

spect of any liability arising from their contract, and no such assent could be inferred from their conduct, as Mr. Pollock points out in his Treatise on Contracts (page 193), unless there had been an unambiguous request. The assignment being therefore merely of the benefit of the contract, it is clear upon the authorities that the defendants could not object to take delivery of the goods unless perhaps they could plead the custom of the trade as opposed to it, and no attempt was made to do this. (Pollock on Contracts, page 454.) We must therefore answer the question referred to us in the affirmative.

Costs of reference to be costs in the suit.

1891.

Aug. 14.

BANK OF BENGAL, PLAINTIFFS, versus VYABHAI GANGJI,
DEFENDANT. *

Presidency Small Cause Courts Act (XV. of 1882), section 69—Requisition for reference must be made before judgment delivered—Civil Procedure Code (XIV. of 1882), section 257A—Agreement to give time for the satisfaction of a judgment-debt—Agreement void if not sanctioned by the Court—Void, i. e. not enforceable—Agreement not illegal.

A party requiring a Judge of the Small Cause Court to make a reference to the High Court under section 69 of the Presidency Small Cause Courts Act (XV. of 1882) must do so before the Judge has delivered his judgment.

Section 257A of the Civil Procedure Code when it provides that every agreement to give time for the satisfaction of a judgment-debt shall be void, unless made for consideration and with the sanction of the Court &c., does not make such agreements illegal in the sense of prohibited by law. It only prevents such agreements being enforced in a Court of law.

Where such an agreement to give time, never sanctioned by the Court as required by section 257A, formed part of the consideration for a bond and had actually been enjoyed by the obligee of the bond ;

Held, that such consideration not being in its nature illegal, and not having as a fact failed, there was no reason why the obligor should not enforce the terms of the bond.

CASE stated for the opinion of the High Court under section 69 of the Presidency Small Cause Courts Act (XV. of 1882) by W. E. Hart, Chief Judge.

1. This was an action on a bond dated 24th June 1890 executed by the defendant as surety with others as principals to recover the

* Reported at I. L. R. 16 Bom. 618.

amount of three instalments of Rs. 250 each due on the 15th of January, February, and March, respectively, together with interest on each instalment, amounting in all to Rs. 6-1-6. The bond runs as follows :

“This indenture made the 24th day of June 1890 between Karmalibhai Jusub of Bombay, Khoja inhabitant, merchant, Jafferbhai Purdhan, also of Bombay, Khoja inhabitant, merchant, and Jusubbbhai Dadur, also of Bombay, Khoja inhabitant, merchant, of the first part, Vyabhai Gangji, also of Bombay, Khoja inhabitant, merchant, of the second part, and the Bank of Bengal, carrying on business in Elphinstone Circle, within the Fort of Bombay (hereinafter called the said Bank) of the third part ; Whereas the said parties hereto of the first part are jointly and severally indebted to the said Bank in the sum of Rs. 15,000 in respect of certain *hundis* which they have negotiated with the said Bank, and whereas the said Bank on the 25th day of January 1890 obtained a decree in the High Court of Judicature at Bombay for Rs. 3,033-0-8 and costs against the said Karmalibhai Jusub and Jafferbhai Purdhan, being a part of the said sum of Rs. 15,000, and have applied to the said Karmalibhai Jusubbbhai and Jafferbhai Purdhan and Jusubbbhai Dadur to pay to them the said Bank the balance of the said sum of Rs. 15,000, namely the sum of Rs. 11,966-15-4, which however they are unable to do at present ; and whereas in consideration of the said Bank's agreeing to postpone the execution of the said decree, and on their consenting to accept the sum of Rs. 5,000 in full discharge of the amount of Rs. 3,033-0-0 due under the said decree and of the said sum of Rs. 11,966-15, being the balance of the said sum of Rs. 15,000, upon the terms and conditions hereinafter appearing, and upon the said Vyabhai Gangji agreeing to join them the said Karmalibhai Jusub, Jafferbhai Purdhan, and Jusubbbhai Dadur as surety for the payment of the sum of Rs. 4,000, being the balance of the said sum of Rs. 5,000, after deducting the sum of Rs. 1,000 paid to the said Bank on the execution of these presents as hereinafter appearing, in sixteen equal monthly instalments of Rs. 250 each, which the said Vyabhai Gangji has agreed to do, as is testified by his being a party to and signing these presents : Now this indenture witnesseth that in consideration of the payment to the said Bank by the said parties hereto of the first part of the sum of Rs. 1,000 on or before the execution of these presents (the receipt whereof the said Bank do hereby acknowledge), and in consideration of the premises they the said Karmalibhai Jusub, Jafferbhai Purdhan, and Jusubbbhai Dadur do hereby jointly and severally covenant and agree with the said Bank that the said Karmalibhai Jusub, Jafferbhai Purdhan, and Jusubbbhai Dadur will, on the 15th day of every calendar month, pay to the said Bank the sum of Rs. 250 until the said sum of Rs. 4,000 shall be fully paid, and that if default shall be made in payment of any one of the said instalments by the said Karmalibhai Jusub, Jafferbhai Purdhan, and Jusubbbhai Dadur, he the said Vyabhai Gangji will, on demand being made by the said Bank, pay the amount of such instalment aforesaid to the said Bank ; and it is hereby agreed that in case the said Vyabhai Gangji fail to pay any such instalment as aforesaid upon a de-

1891.

BANK OF
BENGAL
vs.
VYABHAI
GANGJI.

1891.
BANK OF
BENGAL
vs.
VYABHAI
GANGJI.

mand being made to him in that behalf, or in the case of the death of the said Vyabhai Gangji during the continuance of these presents, then and in either of such cases the said Bank shall be at liberty to forthwith execute the said decree and to sue for and recover from the said Karmalibhai Jusub, Jafferbhai Purdhan, and Jusubhbhai Dadur the full amount of the said sum of Rs. 11,966-15-4 after giving credit for the said sum of Rs. 1,000 and any other sum which may have been recovered by the said Bank in the same manner as if these presents had not been entered into. In witness whereof &c."

2. From this it will be seen that the bond was executed for the purpose of securing to the Bank the payment by monthly instalments of Rs. 250 of the sum of Rs. 4,000 as a balance of a sum of Rs. 5,000 (of which Rs. 1,000 had been paid before the execution of the bond) for which the Bank had agreed to compromise their claim against the principals of Rs. 15,000, made up in part of a decree for Rs. 3,033-0-8, the execution of which the Bank agreed to postpone, and in part of the amount of certain outstanding *hundis* aggregating Rs. 11,966-15-4.

3. The only defence raised before me was that the bond was void under sections 23, 24, and 25 of the Indian Contract Act (IX. of 1872) for illegality, by reason of the consideration for it on the part of the Bank being in contravention of sections 257 and 257A of the Civil Procedure Code.

4. It was not contended on behalf of the plaintiff that the bond was not for an illegal consideration so far as it related to the amount due in respect of the decree, but it was suggested that I should calculate how much of the Rs. 5,000 for which the total claim of the Bank was compromised should be taken to have been in respect of the *hundis*, and apportion accordingly the sum claimed on account of the instalments between the legal and the illegal portions of the consideration.

5. I was of opinion that it was not possible to separate the two so as to determine what was due in respect of each, and accordingly dismissed the suit with costs Rs. 34.

6. I was then requested by the plaintiff's attorney, under section 69 of the Presidency Small Cause Courts Act, to make my judgment contingent on the opinion of the High Court on the question whether the illegal portion of the consideration for the bond is separable from the legal.

7. To this question he also then requested me to add a second, namely, whether the defendant by having executed the bond was not estopped from denying its legality, which had not been suggested at the hearing nor considered or decided by me.

8. On the following day the plaintiff's attorney made an *ex parte* application to me to add to these two questions a third, namely, whether the bond is in contravention of sections 257 and 257A of the Civil Procedure Code and for an illegal consideration, so far as it relates to the amount due in respect of the decree.

9. This I at the time refused to do, first, because he had allowed the case to be decided on the assumption that the bond was illegal so far as it related to the decree, and secondly, because his present application was too late.

10. On consideration, however, it appears to me doubtful whether he is not entitled to require a reference on this question, as much as on either of the other two, and as it is the main question involved in the suit, I have thought it best to include it subject to his right to require me to make the reference.

11. At the same time I submit also for the opinion of their Lordships the following two questions in regard to this case :

(a) Is the plaintiff's attorney entitled to require the reference of any and which of the three questions above stated under section 69 of the Presidency Small Cause Courts Act, he not having made requisition for such reference until after judgment had been delivered?

(b) Within what time is a party entitled to require a reference under section 69 of the Presidency Small Cause Courts Act?

12. The plaintiffs have paid into the Court to abide the result of this reference the amount of costs awarded to the defendant and the sum of Rs. 50 for the costs of the reference.

Inverarity for the plaintiff.

[SARGENT, C.J.—We think a liberal construction must be placed upon this section 69 of the Small Cause Courts Act. Mr. Hart, it is not disputed, delivered no formal judgment such as is contemplated by the Code, and that being so, we think Mr. Bayley was in time in asking for these points to be reserved.]

Inverarity on the merits—The bond is not within section 257A. That is a section in an Act dealing with procedure, and not with substantive rights. It occurs in a chapter dealing exclusively

1891.

BANK OF
BENGAL
vs.
VTABHAI
GANGJI.

1891.
BANK OF
BENGAL
vs.
VYABHAI
GANGJI.

with execution proceedings. There was no agreement for a sum in excess of the judgment. This section does not apply where there are, as here, other considerations than the judgment-debt. The consideration for the bond was not a giving of time for the satisfaction of a judgment-debt, but the substitution of a new liability altogether for an old one, the old one being partly made up of a judgment-debt. He cited *Pandurang Ramchundra vs. Narayen*,⁽¹⁾ *Ganesh Shivram vs. Abdullabeg*,⁽²⁾ *Jhabber Mahomed vs. Modan Sonahar*,⁽³⁾ *Hukumchund Oswal vs. Taharunnessa Bibi*,⁽⁴⁾ *Sellamayan vs. Muthan*,⁽⁵⁾ *Bai Shri Majirajbai vs. Narotum Hurgovan*,⁽⁶⁾ *Ramghulam vs. Janki Rai*,⁽⁷⁾ *Davlatsing vs. Pandu*,⁽⁸⁾ *Vishnu Vishvanath vs. Hur Patel*.⁽⁹⁾ Section 257A does not apply to a surety, *Yella vs. Munisami*.⁽¹⁰⁾ That section does not make the agreement void so far as the surety is concerned. It is void only in the sense that that part of the consideration could not be given legal effect to: there is no illegality in it. But there is other consideration in the bond, and even this consideration, if giving time was the consideration, has actually been enjoyed.

Lang (Advocate General) for the defendant—The Bank is not bound by the agreement. They can execute the decree. That agreement is void and illegal and cannot be enforced.

JUDGMENT OF THE HIGH COURT (Sir C. Sargent, C.J.,
and Bayley, J.)

In answer to the questions submitted to us by the Chief Judge marked (a) and (b), para. 11 of the case, we must reply that the language of section 69 of the Small Cause Courts Act XV. of 1882 shows that the party requiring the Judge to make the reference to the High Court must do so before the Judge has delivered his judgment, as it gives the Judge the option, on being so required, either of postponing his judgment or delivering it contingent on the opinion of the High Court.

(1) I. L. R. 6 Bom. 300.

(2) I. L. R. 8 Bom. 538.

(3) I. L. R. 11 Cal. 671.

(4) I. L. R. 16 Cal. 504.

(5) I. L. R. 12 Mad. 61.

(6) I. L. R. 13 Bom. 672.

(7) I. L. R. 7 All. 124.

(8) I. L. R. 9 Bom. 176.

(9) I. L. R. 12 Bom. 499.

(10) I. L. R. 6 Mad. 101.

In this case the Judge had dismissed the suit with costs before he was asked to refer any of the questions to this Court, and therefore *prima facie* all the questions were referred after the time contemplated by the section. It would appear, however, from what has been stated to us, and without any dissent on the part of the defendant, that in this case only a decree was passed dismissing the suit without any formal judgment being delivered stating the grounds of the decision, the Judge having already, in the course of the argument, expressed an opinion on the legal aspect of the case; and it was urged that under the circumstances there had been no formal judgment delivered, as contemplated by the section when the applications to the Judge to refer the questions now referred to us were made, and therefore that such applications were not open to the objection that they were made too late.

We have already expressed our opinion that the plaintiffs are entitled, in strict right, to insist on this view of what occurred at the trial.

Proceeding, then, to the consideration of these questions, we observe that the consideration for the bond passed by the defendant to the Bank of Bengal is the promise on the part of the Bank to postpone execution of the decree of 25th January 1890 for Rs. 3,033-0-8 and costs, and their consenting to accept Rs. 5,000 in full discharge of that sum and also of the sum of Rs. 11,966-15-4 due to the Bank in respect of certain *hundis*. Since the amendment of section 258 by the Act VII. of 1888 no difficulty can arise from the adjustment of the two debts not having been sanctioned by the Court, but it is contended that the agreement to postpone execution of the decree without the sanction of the Court was illegal by section 257A, Civil Procedure Code, and therefore by section 24 of the Contract Act the bond was void. Section 257A says: "Every agreement to give time for the satisfaction of a judgment-debt shall be void, unless it is made for consideration, and with the sanction of the Court which passed the decree, and such Court deems the consideration to be under the circumstances reasonable." That section has been, by a series of authorities in this Court, held applicable to a bond of this nature, and not to be confined to proceedings in execution, in that respect differing no doubt from the ruling

1891.
BANK OF
BENGAL
VS.
VYABHAI
GANGJI.

1891.

BANK OF
BENGAL
RS.
VYABHAI
GANGJI.

of the Calcutta High Court, *Jhabber Mahomed vs. Modan Sonahar*,⁽¹⁾ but we think there is no sufficient reason for construing the expression "void" in the section as equivalent to illegal in the sense of prohibited by law. The object of the section as a whole would appear, as stated in *Hukum Chund Oswal vs. Taharunnessa Bibi*,⁽²⁾ to be to avoid inconvenience and delay in executing the decree, and also we would suggest to afford some protection to the parties against unfair arrangements. This object, however, will be adequately insured by holding that such agreements cannot be enforced unless made with the sanction of the Court. In other words, the consideration for the bond, so far as it consists of an agreement to stay execution, is only illegal in the sense—as Bramwell, B., expresses it in *Cowan vs. Milbourn*,⁽³⁾—that it is not capable of being the foundation of any legal right.

The result is as stated by Anson on the Law of Contracts (5th Ed.), page 206, that the consideration for the bond fails in the eye of the law, so far as it depends on the promise of the Bank not to execute the decree. The Bank has nevertheless, as a fact, performed that part of the agreement, and the question for consideration is whether, under these circumstances, the Bank could now sue the principal debtors, for whom the defendant is a surety, for the due payment of the instalment.

We think that, on principle, the question must be answered in the affirmative. The contract between them was not invalidated in its formation by the legal failure of part of the consideration, and no part of the consideration has failed in point of fact so as to give the debtors a counter-claim of any description.

The third question should, therefore, be answered in the negative so far as the right to sue on the bond is concerned, and it becomes unnecessary to consider the first two questions.

Attorneys for plaintiff—*Crawford, Burder, and Co.*

Attorneys for defendants—*Payne, Gilbert, and Sayani.*

(1) I. L. R. 11 Cal. 671.

(2) I. L. R. 16 Cal. 507.

(3) I. L. R. 2 Exch. 233.

NARAYAN JETHA, PLAINTIFF, versus THE MUNICIPAL COMMISSIONER AND THE MUNICIPAL CORPORATION OF BOMBAY, DEFENDANTS.*

1891.
Sept. 18.

Negligence—Death by negligence—Act XIII. of 1855—Suit for damages by parents of a child killed by negligence—Contributory negligence—Liability for negligence of servants—Damages—Deduction for maintenance of child—Funeral expenses.

The plaintiff's unmarried daughter, a child of between five and six years old, fell into an open manhole of a sewer in a lane in Bombay on the 28th August 1890 between 4-30 and 5 o'clock P.M., and when her body was recovered life was extinct. The sewer was vested in the Municipality of Bombay and was under the control of the Municipal Commissioner by virtue of sections 220 and 289 of the Bombay Municipal Act of 1888. When such manholes are opened it is the duty of the Municipal Commissioner under section 321 of that Act to have them properly fenced and guarded.

On the 28th August 1890 the manhole in question was opened for the purpose of inserting a flushing door in the sewer. From the time the manhole was opened until the occurrence of the accident, the deceased child's mother was seated at the corner of the street selling cucumbers, about four yards from the manhole in question. The hole was at first properly fenced with four timber hurdles about four feet high set upright round it at a distance of two feet from the hole, secured at the corners with ropes. Soon after 4-30 P.M. the superintendent in charge of the work gave orders to cease work and close the manhole for the night. The accident took place almost immediately afterwards. The Judge found on the evidence that the child fell into the open hole in the interval that elapsed between the taking down of the fence and putting the cover on the hole. What she was doing the instant before she fell, there was nothing to show. She was seen running and playing about the street during the afternoon. Her mother, who was sitting close by, did not see the accident, her attention being at the moment occupied by some customers. She admitted that before the accident occurred she knew the fence was down and the hole open, and she would not have let the child go to it had she been playing beside her.

Held, that the defendants were guilty of negligence, and that they were liable for the negligence of their servants, although the latter acted contrary to the express orders given by their superior ;

(2) that although the mother of the child might have been guilty of negligence which contributed to the accident, yet if the defendants could, by the exercise of ordinary care and diligence, have avoided the mischief which happened, her negligence would not excuse them ;

(3) that, as regards damages, in cases of this nature distinct evidence of the loss sustained or benefit expected is not necessary. The jury may look at all the circumstances of the case and especially at the position of the parents and age of the child and call in aid their own experience in arriving at their conclusions.

Where damages are allowed, a reasonable sum should be deducted on account of the maintenance for such period as the child might reasonably have been expected to live with their parents.

* Reported at I. L. R. 16 Bom. 254.

1891.
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 NARAYAN
 JETHA
 vs.
 THE
 MUNICIPAL
 COMMIS-
 SIONER.

In an action under Act XIII. of 1855, no sum can be awarded in respect of funeral expenses, whether for removal or disposal of the body, or for outlay for ceremonial and obsequial purposes.

CASE stated for the opinion of the High Court under section 69 of the Presidency Small Cause Courts Act (XV. of 1882) by W. E. Hart, Chief Judge.

1. The facts of this case are fully stated in my judgment. Having regard to the importance of some of the questions involved, at the time of delivering judgment I reserved leave to the parties to inform me within a week what points of law, if any, they would require me to refer for the opinion of the High Court.

2. The defendants have now required me, under section 69 of Act XV. of 1882, to refer the following points :

(1) Whether the defendants have been guilty of negligence ?

(2) Whether the defendants are liable for the negligence (if any) of their servants, although the latter have acted contrary to the express orders given to them by their superiors ?

(3) Whether a child of between five and six years of age of the class of life to which the deceased belonged is ordinarily able to take reasonable care of itself ?

(4) Whether the mother of the deceased child was guilty of contributory negligence in leaving the child to take care of itself ?

(5) Whether the "decisive" or "proximate" cause of the accident was not the negligence of the deceased, seeing that the open hole had been seen and avoided by other passers-by ?

(6) Whether, in the event of its being held that a child of five or six years of age of the class of life to which the deceased belonged is not ordinarily able to take reasonable care of itself, the "decisive" or "proximate" cause of the accident was not the negligence of the deceased's mother ?

(7) Whether the little domestic services rendered to the plaintiff and his wife by the deceased in the present case were of any appreciable pecuniary value, and whether the same are sufficient to form the basis of an action under Act XIII. of 1855 ?

(8) Whether the parents of the deceased could have any reasonable expectation of benefit from the continuance of the life of the deceased when it was not proved that they had received any

pecuniary assistance (*i.e.* payment in money) from the deceased during her life ?

(9) Whether, in an action under Act XIII. of 1855 brought by a parent for damages for the death of a child, the fact that such parent had received no pecuniary assistance (*i.e.* payment in money) from such child during its life does not preclude the Court from awarding damages for any alleged reasonable expectation of benefit which the parent might derive from the continuance of the life of such child ?

(10) Whether the damages in the present case have been assessed on the right principle, and whether the same are not excessive ?

(11) Whether, in the case of damages being allowed as in the present case, a reasonable sum should not be deducted on account of maintenance of the child for such a period as the deceased might reasonably have been expected to live with her parents ?

(12) Whether in an action under Act XIII. of 1855 any sum can be awarded in respect of funeral expenses, whether for the mere removal and disposal of the body or for the outlay for ceremonial and obsequial purposes, and if so, to what amount ?

(13) Whether the decisions of the Irish Courts under Lord Campbell's Act (9 and 10 Vict. c. 93) are binding on the Court of Small Causes at Bombay as authorities of equal weight as the decisions in the English Courts, and if not, to what extent the same are binding ?

3. Some of these seem to me to be rather questions of fact than of law, and some again, though questions of law, not to arise on my finding of the facts. But, inasmuch as the case is one of some importance both to the public and the Municipality of Bombay, and because in questions of negligence as in questions of fraud, it is not always easy to define precisely the boundary line where fact ends and law begins, I have thought it better to submit to their Lordships the questions I am required to refer, exactly in the form in which they have been forwarded to me.

The following were the facts of the case as stated in the judgment of the Chief Judge :

" It is undisputed that the deceased child Hira, the infant unmarried daughter of the plaintiff and his wife Ganga, between 4-30 and 5 P.M. on 28th August

1891;

NARAYAN
JETHA
VS.
THE
MUNICIPAL
COMMISSIONER.

1891.

NARAYAN
JETHA
vs.
THE
MUNICIPAL
COMMISSIONER.

1890, fell down an open manhole of a sewer in Khetwadi Tenth Lane, at that time under the control of the first defendant and vested in the second by virtue of sections 220 and 289 of the City of Bombay Municipal Act, 1888, and when her body was recovered from another manhole some three hundred feet distant life was extinct.

“ These manholes are circular openings in the street, wide enough to allow the passage of a man's body for the purpose of giving access to the sewers under the roadway. Ordinarily they are kept closed by round covers made of thick plates of iron fitted over them, which to prevent obstruction to the traffic must be at the level of the road. When they are open, it is the duty of the first defendant, under section 321 of the City of Bombay Municipal Act, to have them properly fenced and guarded.

“ On 28th August 1890 the manhole in question was opened at about 1-30 P.M. with five others for the purpose of inserting a flushing door in the sewer, the work for which was carried on at another manhole in the opposite lane. From about the time the manhole was opened till the occurrence of the accident, the deceased child's mother was seated at the corner of the street with a basket of cucumbers, which she was selling to the passers-by, at a distance of about four yards from the manhole in question, and, as she now says, with her back to it. But in her deposition before the Coroner she is recorded as having said facing it, and Inspector Chislett of the Bombay Police, who was on the spot soon after the accident and questioned her about it, says she showed him the spot where she was sitting with her face towards the manhole, and that, I think, must have been her real position, otherwise she would have been turned away from the passers-by who were to be her customers. She admits that the manhole was at first properly fenced with four timber hurdles about four feet high set upright round it, at a distance of about two feet from the hole, secured at the corners with ropes. She says this fence was taken down about 3 P.M. But I think she fixes the time for this too early. The rest of the evidence leaves no doubt in my mind that the fence remained as first erected till Mr. Etias, the superintendent in charge of the work, gave orders soon after 4-30 P.M. to cease work and close the manholes for the night. The mukádam Vithu Balu says that during the whole of his time two men, named Rama and Bhau, remained in charge of the manhole in question. Unfortunately having left Bombay they were not examined. But I think it is very improbable that Vithu is correct in his statement, which cannot have been made from personal knowledge, as he says he went away himself. In the first place Mr. Etias says that as the work was going on at another hole there was no one in particular at the hole in question. In the second place it is not likely that, with a hole properly fenced, two men would be employed for three hours to do nothing but sit by it. In the third place, if they were, it is not likely that they would go away, at any rate till such time as they might be missed. Lastly, Vithu Balu himself says that on receiving orders from Mr. Etias to close the manhole for the night, which according to Mr. Etias were given to him at another hole three hundred feet away, he ordered these same men,

Rama and Bhau, to close the manhole in question, and within two minutes of doing so, heard the alarm of the accident, when he was himself at another manhole eighty feet off. I think therefore Rama and Bhau were not at the manhole in question when orders were given to close it. I consider it very improbable that they had been there ever since it was opened, and certainly they were not there when the child fell in. To that extent the hole was not guarded as required by section 321 of the City of Bombay Municipal Act. However, I find nothing in the evidence which leads me to suppose that the fence was not in proper order round the hole from the time it was opened about 1-30 P.M. till orders were given to close it about 4-30 P.M. It appears from the evidence of Mr. Etias that his orders to the mukadam were to put the covers on to the manholes before removing the fences, and from the mukadam's evidence it appears that this is what is generally done. But he does not say that he expressly communicated Mr. Etias's order to this effect to Rama and Bhau, and he goes on to say: "If there is a difficulty about getting the cover on we push the fence away." I think it is clear on the evidence of both sides as to the state of the fence at the manhole in question, immediately before and immediately after the accident, that at the moment the child fell into the open hole the fence had all been taken down; two pieces were lying flat on the road near the hole, and the other two were set leaning against a firewood stack a few feet off. Mahomed Ali, who inhabits a house immediately overlooking that manhole, says that his attention was called to the accident by a cry raised by the mother of the child, and there was then no one else on the road near the hole except two coolies. These may have been Rama and Bhau on their way back to the hole after removing the first two pieces of the fence to the woodstack in order to remove the other two and close the hole. If not, then Rama and Bhau must have gone off to a greater distance than the woodstack, or to some business other than the closing of this hole. Clearly the fence had all been taken before the cover was put on the hole, and some of it had been removed to a distance of some feet. I have no doubt the child fell into the open hole in the interval that had elapsed after the taking down of the fence soon after 4-30 P.M., and possibly during the process of its removal to the woodstack. What she was doing the instant before she fell, there is nothing to show. Two of the witnesses saw her in the act of falling, and one of them saw her playing and running about the street during the afternoon. But neither of them could say what she was doing the moment before she fell. Her mother, who was sitting close by, did not see the accident, her attention being at the moment taken up by some customers, and she was first apprised of it by the exclamation of some passers-by who saw the child fall. She admits that before the accident occurred she knew the fence was down and the hole open, and that she would not have let the child go to it had she been playing beside her. This, according to her deposition, as recorded by the Coroner, is exactly what the child was doing, though before me she said she had kept the child in the house a considerable distance further from the manhole on the other side than she was sitting with the cucumbers.

1891.

NARAYAN
JETHA
vs.
THE
MUNICIPAL
COMMISSIONER.

1891.
 NARAYAN
 JETHA
 vs.
 THE
 MUNICIPAL
 COMMISSIONER.

"In this state of the facts I have to consider the defences raised before me at the hearing. They were, first, denial of negligence on the part of the defendants; second, contributory negligence on the part of the child; third, contributory negligence on the part of her mother; fourth, absence of pecuniary loss to the plaintiff by reason of the child's death such as would entitle him to sue under the provisions of Act XIII. of 1855; fifth, denial of damage to the amount claimed."

The Chief Judge gave judgment for the plaintiff for Rs. 250, apportioning that sum between the plaintiff and his wife Gunga in equal shares.

There was no appearance for the plaintiff.

Jardine for defendants.

JUDGMENT OF THE HIGH COURT (Sir C. Sargent, C.J.,
 and Farran, J.)

In this case numerous points have been referred to this Court by the Chief Judge of the Small Cause Court under Act XV. of 1882.

The first two questions must be answered in the affirmative, for the reasons which the Chief Judge himself has given in his judgment. Section 321, clause (b), of the Municipal Act imposes on the Commissioner the statutory duty of having "all places, where the street is opened, fenced, and guarded," and his default in taking this precaution made him liable in damages for the consequences of his negligence, and whatever instructions may have been given to the employés of the Municipality, such liability remains unaffected. The cases of *Gray vs. Pullen*⁽¹⁾ and *Limpus vs. London General Omnibus Company*,⁽²⁾ referred to by the Chief Judge, are conclusive authorities for the above propositions.

Questions 3 and 4 are questions of fact. Question 6 does not arise.

Passing to the fifth point we understand it as intended to raise the question whether there was contributory negligence on the part of the deceased child which would have prevented the child from recovering damages from the defendants had the accident not proved fatal. The propositions of law which determine this question are stated as follows by Lord Penzance when delivering the judgment of the House of Lords in *Radlye vs. London and North-Western*

(1) 34 L. J. Q. B. 265.

(2) 1 H. & C. 526.

Railway Company,⁽¹⁾ as deducible from the authorities amongst which is *Tuff vs. Warman*,⁽²⁾ to which the Chief Judge of the Small Cause Court has referred, viz. (1) the plaintiff cannot succeed if it is found by the jury that he has himself been guilty of any negligence or want of ordinary care which contributed to cause the accident; (2) although the plaintiff may have been guilty of negligence and although that negligence may, in fact, have contributed to the accident, yet, if the defendant could, in the result by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him. The Chief Judge of the Small Cause Court, as appears from the judgment, has applied both those rules to the evidence, and answered questions 4, 5, and 6 in favour of the plaintiffs.

Passing to the seventh and eighth questions which relate to the evidence in the case on the plaintiff's claim to compensation, it has long been settled by authority, as the Chief Judge of the Small Cause Court himself points out, in construing Lord Campbell's Act, which is *in pari materia* with the Indian Act XIII. of 1855, that the plaintiffs cannot recover either nominal damages or a solatium, but must show that they have suffered appreciable pecuniary loss by the death of the deceased, or had a reasonable expectation of pecuniary benefit from the continuance of her life. It is sufficient to refer to *Duckworth vs. Johnson*⁽³⁾ and *Sykes vs. N. E. Railway Company*.⁽⁴⁾ The difficulty, however, is, as Baron Bramwell says in the former case, upon what evidence the jury should act. The Chief Judge has applied those rulings to the evidence, and found that the plaintiffs were entitled to compensation on both the above grounds, and has awarded them Rs. 250, and if his finding can be regarded as raising a point of law capable of being referred to this Court, it can only be whether, by analogy to the question which presents itself to Judges in England on a motion to set aside the verdict, there was any evidence upon which the Chief Judge could find, as he did, in favour of the plaintiffs. The English and Irish authorities doubtless show an important difference of judicial opinion, more especially as to how far the jury may form their own estimate of the loss sustained, or expectation of benefit without the aid of distinct evidence. (See Bevan on Negligence, page 170.)

1891.

NARAYAN
JETHA
vs.
THE
MUNICIPAL
COMMISSIONER.

(1) L. R. 1 A. C. at p. 758.

(3) 4 H. & N. 653.

(2) 5 C. B. (N. S.) 573.

(4) 44 L. J. (N. S.) C. P. 191.

1891.

NARAYAN
JETHA
vs.
THE
MUNICIPAL
COMMISSIONER.

The conflict of opinion is very marked between the judgments in *Holleran vs. Bagnell*,⁽¹⁾ and that of Pollock, C.B., in *Duckworth vs. Johnson*.⁽²⁾ In the latter case Pollock, B., says: "There is no distinct evidence of the boy's services or the cost of boarding and clothing him, but as to that the jury were better able to judge than we are." Whereas Morris, C.J., says in the former case: "There must be distinct evidence of pecuniary advantage actual or reasonably expected at the time of the death." However, in *Condon vs. Great Southern and Western Railway*,⁽³⁾ where the boy had never earned wages, we find Pigot, C.B., holding that the jury are entitled to apply their own experience and knowledge of life; and in *Wolfe vs. Great Northern Railway Company*,⁽⁴⁾ the Irish Appeal Court, in the main, adopted the view taken in *Duckworth vs. Johnson*,⁽²⁾ which, it was remarked, had never been dissented from in the English Courts.

The result of these authorities, as a whole, is, we think, to show that in dealing especially with cases of this nature distinct evidence of the loss sustained or benefit expected is not necessary, but that the jury may look at all the circumstances of the case and especially at the position of the parents and age of the child, and call in aid their own experience in arriving at their conclusion. The judgment of the Chief Judge shows that he has virtually acted on this principle in the present case, and, therefore, his findings are unimpeachable. But he admits that he has intentionally omitted to deduct the expenses of the child's maintenance because no argument was addressed to him on the subject, and he refers to *Duckworth vs. Johnson*⁽²⁾ in support of his decision; but there the Court considered that although there was no evidence on the subject, still the jury might be supposed to have taken it into consideration in determining the amount of compensation, but here the Judge admits that he has not taken it into consideration, and as it is an essential factor in the question, we think he was bound to do so before arriving at a conclusion as to the amount of compensation and that too without any argument being addressed to him on the subject. Question 11 should, therefore, be answered in the affirmative.

(1) L. R. (Ir.) 6 C. L. 333.

(3) 16 Ir. C. L. R. 416.

(2) 4 H. & N. 653.

(4) L. R. (Ir.) 26 C. L. 548.

As to the claim for loss arising from the funeral expenses, the Judge has rightly refused it on the authority of *Walton vs. S. E. Railway Company*.⁽¹⁾ In section 2 of the English Act the word "injury" is used instead of "loss," but we do not think that this difference of expression affects the reason for the English decision, which was that funeral expenses were not an injury resulting from the death within the meaning of section 2 of the Act.

Question 12 should be answered in the negative. It is unnecessary to answer question 13.

Attorneys for defendants—*Crawford, Burder, Buckland, and Bayley*.

VANMALI HARGOVIND, PLAINTIFF, versus TARACHAND
GANESHAMDA'S, DEFENDANT.

Contract—Forward delivery—Contract "not to be cancelled"—Rules of the Bombay Cotton Trade Association—Rule XVII—Claim for damages by seller who is not ready and willing to deliver on the due date.

In the case of a contract for the forward delivery of cotton made subject to the rules of the Bombay Cotton Trade Association, but containing the stipulation "not to be cancelled," if the seller is not ready and willing to deliver on the due date, and the market rate is then lower than the contract price, and the purchaser does not buy in the market at the risk and expense of the seller, the seller is not entitled afterwards to recover from the purchaser the difference between the contract price and the market rate at the due date of the contract.

The ordinary relief given to a purchaser in the event of the contract not being performed by the vendor is to go into the market and buy the goods and claim the difference. Rule 17 of the above rules points out three courses. When a vendor is not ready and willing to deliver he cannot sue.

CASE stated for the opinion of the High Court by W. E. Hart, Chief Judge.

1. On 8th February 1891 the plaintiff and defendant entered into a contract for the sale by the plaintiff and purchase by the defendant of 200 bales of new Broach-ginned cotton at Rs. 203-4 per khandi deliverable from 15th to 25th March 1891.

2. On 10th February 1891 they entered into another similar contract for the sale and purchase of a like quantity of cotton of the

(1) 4 C. B. N. S. 296.

1891.
NARAYAN
JETHA
vs.
THE
MUNICIPAL
COMMISSIONERS
of
SHEIKH
PURA.

1891.
Oct. 2.

1891.

VANMALI
HARGOVIND
vs.
TARACHAND
GANESHAM-
DÁS.

same description at Rs. 203-8 per khandi deliverable between the same dates.

3. Both of these contracts were made subject to the rules of the Bombay Cotton Trade Association, except that it was expressly provided in them that they were "not to be cancelled."

4. On 22nd March 1891 the defendant entered into a third contract with the plaintiff, of settlement in regard to a part of the cotton agreed to be purchased by the defendant under the first of the two contracts abovementioned, whereby the defendant agreed to sell to the plaintiff 100 bales of new Broach-ginned cotton at Rs. 196 per khandi.

5. There thus remained 300 bales of cotton of the contract description to be delivered by the plaintiff to the defendant by 25th March 1891.

6. On 20th March 1891, and again on 25th March 1891, the defendant wrote to the plaintiff reminding him of his contracts of sale and demanding delivery under them by the due date which, according to the rules of the Bombay Cotton Trade Association, would be by noon on 25th March 1891.

7. The plaintiff did not reply to either of these letters and did not deliver any cotton, and the defendant wrote to him again on 26th March 1891, informing him that in consequence of such default he considered the contracts for purchase by himself to be "null and void" as per rules of the Bombay Cotton Trade Association. To this letter also the plaintiff made no reply, and I find as a fact that he was not ready and willing to deliver any cotton to the defendant at noon on 25th March 1891.

8. The market rate of cotton of the description contracted to be sold by the plaintiff to the defendant was then Rs. 197-8 per khandi.

9. On the 8th May 1891, the plaintiff by his attorneys wrote to the defendant demanding payment of Rs. 1,406-1-3 as the difference between the contract price and the market rate of the cotton on the due date.

10. To this the defendant replied by his attorneys on 11th May 1891 tendering Rs. 342-9 as the amount due under the contract of settlement in respect of 100 bales, and stating in regard to the other 300 that the defendant considered the contract as to them "at

an end" by reason of the plaintiff's default in making delivery on the due date, although delivery had been demanded by the defendant.

11. The plaintiff has now filed this suit for the recovery of Rs. 1,393-14, which amount he makes up as follows—Rs. 362 he claims as the amount due to him under the settlement contract of 22nd March in regard to the 100 bales re-sold by the defendant at Rs. 196 per khandi against his contract of 8th February for the purchase of 200 bales at Rs. 203-4 per khandi. Rs. 1,113 he claims as damages by reason of the defendant not having invoiced back to him the 300 bales which still remained to be delivered by the plaintiff on 25th March at Rs. 196 per khandi against the contract prices of Rs. 203-4 per khandi for 100 bales and Rs. 203-8 per khandi for 200 bales. Against the total of Rs. 1,475 so arrived at he allows Rs. 81-2 as discount at $5\frac{1}{2}$ per cent. as provided by the contracts.

12. The defendant admits the claim to the extent of Rs. 342-9 only, as due under the contract of settlement, which he pays into Court, and as to this he pleads the tender before action which the plaintiff admits. As to the rest of the claim, he contends that the plaintiff having himself committed a breach of his contracts and not having been ready and willing to perform his part on the due date cannot claim damages under them.

13. The case depends upon the construction of rule 17 of the rules of the Bombay Cotton Trade Association, which is in these words: "All cotton bought for forward-delivery shall be ready, and delivery-order for the same tendered by noon on the latest date specified in the contract. In case a delivery-order for the cotton or any portion of it is not so tendered, or in case the cotton or any portion of it for which a delivery-order has been passed is not available for delivery, the buyer shall have the option of cancelling the same, or of buying in the market at the risk and expense of the seller, or of invoicing the cotton back to the seller at the market rate of the day."

14. The plaintiff contends that the contracts in question having been made subject to this rule, with the exception of the provision as to cancellation on his default to make delivery on the due date, the defendant was bound either to buy in the market at his risk and expense, or to invoice the cotton back to him at the market rate of the day, which was lower than the contract price, and not having done the former and being unable to do so now, he is bound to do the latter as the contract enures to his benefit after the due date for

1891.

VANMALI
HARGOVIND
vs.
TARACHAND
GANESHAM-
DAS.

1891.

VANMALI
HARPOVIND
ES.
TARACHAND
GANESHAM-
DAS.

performance being by its terms incapable of cancellation on his default

15. It is clear the latter course was not originally obligatory on the defendant, for the rule expressly gives him the option of an alternative; and it is hard to suppose that the parties intended by their contracts that what was not obligatory in the first instance should become so by the mere lapse of a few days. The option too is not to buy on account of the seller so as to account to him for the difference, but at his risk and expense, which of course in the case of a fall in the market would be *nil*. It also seems to me that the construction should, if possible, be avoided which would give the party first committing a breach of the contract the right to bring an action on it at any time within three years of its breach by himself, especially as that construction would apparently land us in the absurdity of having a contract on which each party might maintain an action against the other, for the defendant might have sued the plaintiff on his breach, though in the circumstances of the present case he could of course only have recovered nominal damages. The construction contended for by the plaintiff would also encourage the making of such contracts as mere gambling speculations as sellers, by persons with no means to perform the contract and no intention of delivering the cotton. For, in the case of a fall in the price they would look to the buyer to collect their profit for them, and in the case of a rise they would commit a breach of the contract, be unable to pay damages, and not be worth suing.

16. However, as both parties desire a reference to the High Court on the question, and have each paid Rs. 25 into Court to cover the costs of it, and as I am informed that there are several more suits involving the same point now pending in this Court, and the idea appears to be prevalent among native dealers that a contract worded like those in suit operates so as virtually to exonerate the seller from performance if the market goes down, I have reserved my judgment pending the receipt of the answer of the High Court to the following question:

In case of a contract for the forward delivery of cotton made subject to the rules of the Bombay Cotton Trade Association but "*not to be cancelled*," if the seller is not ready and willing to deliver on the due date, and the market rate is then lower than the

contract price, and the purchaser does not buy in the market at the risk and expense of the seller, is the seller entitled afterwards to recover from the purchaser the difference between the contract price and the market rate on the due date of the contract?

1891.

VANMALI
HARGOVIND
vs.
TARACHAND
GANESHAM-
DAS.

JUDGMENT OF THE HIGH COURT (Sir C. Sargent, C.J., & Farran, J.).

The ordinary relief given to a purchaser in the event of a contract not being performed by the vendor is to go to the market and buy the goods and claim the difference. Rule 17 of the Bombay Cotton Trade Association points out three courses. When a vendor is not ready and willing to deliver he cannot sue. Our answer must be in the negative.

Costs of the reference to be costs in the case, to be taxed on the Original Side.

KILLICK, NIXON, & COMPANY, PLAINTIFFS, versus BEYTS,
CRAIG, & COMPANY, DEFENDANTS.

1891.

Oct. 7.

Shipping order—S S. "Mary Beyts" or substitute—Subject to safe arrival—Non-arrival of steamer by the cancelling date—Refusal to give substitute—Cancellation of order by shippers—No damage allowed.

Defendants sold freight for 555 tons seeds to plaintiffs under a shipping order dated 5th March 1891, *subject to safe arrival*, by the s.s. "Mary Beyts" or substitute. Shipper's option to cancel if steamer not ready on or before 25th May 1891. The s.s. "Mary Beyt," met with an accident and could not arrive by the 25th May. Plaintiffs called upon defendants to declare a substitute before the due date. Defendants admitted the s.s. "Mary Beyts" would not save the cancelling date, and refused to name a substitute, but enquired if plaintiffs would retain the order or not. To this plaintiffs replied that unless a substitute was declared before the due date, they would treat the order as cancelled and buy freight on defendants' account. Defendants thereupon accepted the cancellation of the shipping order per s.s. "Mary Beyts," and declined all liability for loss or damage. Plaintiffs purchased freight for the due date for the said 555 tons seeds at 5s. higher than the contract-rate mentioned in the shipping order, and sued to recover damages at the said rate.

Held, that there was no breach of contract by the defendants for which the plaintiffs could recover damages.

CASE stated for the opinion of the High Court by W. E. Hart, Chief Judge.

1. This is a suit to recover Rs. 1,921-13 as damages sustained by the plaintiffs by reason of the breach by the defendants of their

1891.

KILLICK,
NIXON, AND
COMPANY
vs.
BEYTS, CRAIG,
AND
COMPANY.

contract to supply freight for 555 tons of the plaintiffs' cargo for Marseilles, estimated at the difference between the contract rate of 22s. per ton and the rate of 27s. per ton at which the plaintiffs purchased a like quantity of freight on account of the defendants.

2. The terms of the contract between the parties are expressed in the following shipping order granted by the defendants on one of their printed forms to Messrs. Nixon & Company, the plaintiffs' brokers, the words underlined being filled in by defendants in writing :

"No.

"Bombay, 5th March 1891.

"*Subject to safe arrival.*

"To the commanding officer of the steam ship 'Mary Beyts,' or substitute, for Marseilles via Suez Canal.

"Lay days not before 1st May 1891.

"Shipper's option to cancel if not ready on or before 25th May 1891.

"Sir,—Please receive on board from Messrs. Killick, Nixon, & Company, who hereby contract to ship 555 tons (five hundred and fifty-five tons) seeds wheat and / or cotton *ex poppy*.

"Cargo to be shipped and port to be named (if option of two ports) on demand, on steamer being ready.

"Freight at £1-2 per ton as per Bombay Chamber of Commerce new tonnage scale.

"Goods to be alongside in time to be all taken in on or before the third day after notice that steamer is ready for cargo, otherwise difference of freight at market rate to be payable on demand as liquidated damages.

"Freight to be paid here at current rate of exchange without any deduction, or by demand bank bills (at shipper's option).

"To load in Prince's Dock if required by the captain.

"Bills of lading to be supplied by us.

"Subject to lighterage clause.

"Relets to be countersigned by us.

"Subject to a lien for freight and difference of freight.

"R. B. NIXON & Co.

"Brokers, Bombay."

"BEYTS CRAIG & Co.

one anna.

3. The steam ship "Mary Beyts" named in the above shipping order is the property, not of the defendants, but of the Bombay Steam Navigation Company, for whom the defendants' firm are agents in Bombay having their head-quarters in London.

4. At the time this shipping order was granted the "Mary

Beyts " was on a voyage homeward bound from Bombay, in the course of which she met with an accident on 10th March 1891, the extent of which was not known in London till about ten days later and the particulars of which were received in Bombay about 22nd April.

5. On the last mentioned date the plaintiffs wrote to the defendants as follows : " We understand that the ' Mary Beyts ' has been damaged and that there is no likelihood of her catching her cancelling date of 25th May. Under your shipping order ' Mary Beyts ' or substitute, will you kindly say what steamer you intend to declare against your order."

6. To this the defendants replied on the same date : " We beg to state that the s.s. ' Mary Beyts ' met with an accident, and we don't think she will save her cancelling date. As we don't intend to substitute, we shall be glad to hear from you whether you retain the order or not. The steamer will probably be June loading."

7. On 25th April 1891 the plaintiffs wrote to the defendants that as they declared the " Mary Beyts " would not save her cancelling date and declined to substitute another steamer as per terms of shipping order, " We hereby give you notice that unless we hear from you again by Wednesday, we shall treat the shipping order as cancelled, and we shall buy the freight on your account, and shall recover any loss we may be put to in the matter from you."

8. To this the defendants replied on 29th April : " We yesterday received your favour dated 25th. We accept your cancelment of our shipping order per s.s. ' Mary Beyts,' and decline all responsibility for any loss you may sustain."

9. On 30th April 1891 the plaintiffs, through 'Messrs. Murray & Company, freight-brokers, bought of Messrs. Chugandás Dharsi & Company 555 tons freight per s.s. " Harewood " or substitute, at 27s. per ton, on a shipping order of which the material terms are identical with those contained in the shipping order granted by the defendants except that it expressly guarantees shipment in May.

10. On the same date the plaintiffs wrote to the defendants advising them of this purchase on their account to replace their sale of 555 tons per " Mary Beyts " or substitute.

11. The rate 27s. per ton was the lowest rate obtainable in Bombay on 30th April 1891 for a guaranteed May shipment. But there is no difference recognised in the freight brokerage business between a May shipment and a guaranteed May shipment.

1891.

KILLICK,
NIXON, AND
COMPANY
vs.
BEYTS, CRAIG,
AND
COMPANY.

1891.

KILLICK,
NIXON, AND
COMPANY
v.s.
BEYTS, CRAIG,
AND
COMPANY.

12. During the last fortnight in April, the defendants as agents for the owners, other than the owners of the "Mary Beyts," had the s.s. "Annie Barrow" loading in Bombay for Marseilles. At the beginning of May they had the s.s. "Acanthus" so loading under a time charter-party to themselves. Freight for both these steamers had been sold before the correspondence between the plaintiffs and the defendants began on 22nd April, but it does not appear that either of them had been filled up, though it is the defendants' rule if possible to fill up their steamers before their arrival in Bombay.

13. The s.s. "Mary Beyts" eventually arrived safe in Bombay harbour during the first week in July, but received no cargo under the shipping orders for May shipment, they having all been cancelled, and, with the exception of the plaintiffs', without objection on the part of the holders.

14. The plaintiffs, however, on 18th June 1891 filed their plaint in the present action, the first five paragraphs of which in substance allege the facts set forth above in paragraphs 2 and 5 to 9.

15. At the hearing before me on 20th August 1891 it was contended on behalf of the defendants :

1st. That the plaint discloses no cause of action, the contract being admittedly subject to the *safe arrival* of the "Mary Beyts" which had not safely arrived, before the plaintiffs exercised their option of cancelling the contract.

2nd. That there was no contract which the plaintiffs could enforce against the defendants when they cancelled on 30th April 1891, the due date for performance not having then arrived.

3rd. That the defendants had not committed a breach of the contract.

4th. That the performance by the defendants of the contract had been excused by the plaintiffs' cancellation of it.

5th. That the defendants had not guaranteed the arrival of the "Mary Beyts" before 25th May.

6th. That the defendants were not bound to supply a steamer ready for loading by 25th May.

7th. That the plaintiffs had not suffered damage claimed.

16. As both parties required a case to be stated for the opinion of the High Court on the points of law involved, I simply took the

evidence necessary to enable me to find the facts as above, and then reserved judgment pending the receipt of the answers of the High Court to the following questions proposed by the parties.

Questions submitted to the High Court on behalf of the plaintiffs :

(1) Whether on the facts as stated, and on a true construction of the shipping order of the 5th March 1891, the time for the performance of the contract to load was fixed as between the 1st and the 25th of May 1891?

(2) Whether defendants were justified in declining to declare a substitute as they did by their letter of the 22nd of April?

(3) Whether the defendants were not bound to give a substitute if the "Mary Beyts" did not or could not arrive by the 25th May? and, under the circumstances of the present case,

(4) Was it wholly optional with the defendants to give a substitute or not in the event of the expected non-arrival of the "Mary Beyts," or was their option simply limited to giving some other steamer than the "Mary Beyts" if they so chose?

Questions submitted to the High Court on behalf of the defendants :

(1) Whether on the facts of the case as stated there was any contract between the plaintiffs and defendants and enforceable against the defendants on the 30th April 1891?

(2) Whether by the shipping order there was any agreement of guarantee binding on the defendants that the s. s. "Mary Beyts" would be ready for loading by the 25th May 1891?

(3) Whether in the event of the s. s. "Mary Beyts" being not ready for loading by the 25th May 1891, there was an agreement of guarantee binding on the defendants to provide a steamer for the plaintiffs which should be ready for loading by the 25th May 1891?

(4) Whether there was merely a power, or option, or liberty given to the defendants to declare a substitute steamer instead of the s. s. "Mary Beyts," which they might exercise or not as they might think fit in their absolute discretion, but which they were not bound to exercise in any event?

(5) Whether on the facts as stated and the true construction of the shipping order there was a contract between the plaintiffs and defendants contingent on the safe arrival in Bombay of the steamer

1891.

KILLICK,
NIXON, AND
COMPANY
vs.
BEYTS, CRAIG,
AND
COMPANY.

1891.

KILLICK,
NIXON, AND
COMPANY
VS.
BEYTS, CRAIG,
AND
COMPANY.

declared by the defendants under such shipping order, which steamer until a substitute was declared was the s.s. "Mary Beyts"?

(6) Whether the performance by the defendants of any contract between the parties was not excused by the action of the plaintiffs in cancelling the shipping order by their letter of the 30th April 1891?

(7) Whether there has been any breach of contract by the defendants for which the plaintiffs can recover damages?

JUDGMENT OF THE HIGH COURT—(Sir C. Sargent, C.J.,
and Farran, J.)

We answer question (7) submitted by the defendant, in the negative.

It is unnecessary to answer the other questions referred to us.

Costs of reference and costs in the cause to be taxed by the Taxing Master on the Original Side.

1892.
July 15.

KUVERJI NANJI AND OTHERS, PLAINTIFFS, VERSUS UMERSI
HARI AND OTHERS, DEFENDANTS.

Breach of contract—Variance between two parts of a written contract—Failure of part—Performance of contract—Damages.

By a contract, in two parts, dated 29th March 1891, defendants agreed to sell to plaintiffs all the bran that might be produced at the Wallace Flour Mill from 8th July to 1st November 1891. The two parts were not exactly similar; the part signed by plaintiffs contained a clause, "I am not to deliver or sell *bhusa* (bran) to Khoja Allarakhia Thaver and Meghji Ladha." The part signed by defendants stated, "From this day I am not to ship to Karachi the bran of this mill." Defendants refused to deliver bran produced after 9th September 1891, on the ground that plaintiffs had sold bran to Allarakhia Thaver and Meghji Ladha. Plaintiffs sued in damages. There was no direct sale by plaintiffs to Allarakhia Thaver or Meghji Ladha, but those persons and the plaintiffs were, with others, members of a pool or partnership, into which all the members brought all bran purchased by them, and sold it at one rate.

Held, the alleged breach by the plaintiffs, if proved, did not afford a good answer to this suit.

CASE stated for the opinion of the High Court under section 69 of the Presidency Small Cause Court Act (XV. of 1882) by C. W. Chitty, Chief Judge.

1. In this case the plaintiffs seek to recover from the defendants a sum of Rs. 1,940-10, being Rs. 1,640-10 damages sustained by them in consequence of the defendants' breach of contract, and 300 the price of 1,500 gunny bags supplied by them to the defendants and appropriated by the defendants to their own use.

2. By a contract in two parts, dated the 29th March 1891, the defendants agreed to sell and the plaintiffs agreed to purchase all the bran that might be produced at the Wallace Flour Mill in Bombay from the 1st Ashad Sud to the 30th Aso Vud 1947 (8th July to 1st November 1891) at the rate of $5\frac{1}{2}$ annas per maund. The two parts of the contract were not exactly similar; that signed by the defendants containing a clause: "From this day I am not to ship to Karáchi the bran of this mill," and that signed by the plaintiffs a clause: "I am not to deliver (or sell) this *bhusa* (or bran) to Khoja Allarakhia Thaver and Thakar Meghji Ladha."

3. The defendants duly delivered all the bran produced at the Wallace Flour Mill to the plaintiffs under the said contract for some time, the last delivery being made on 9th September 1891. The plaintiffs now sue for damages sustained by them in consequence of the defendants' failure to deliver to them the bran turned out from the mill up to the 22nd September 1891, and as the plaintiffs treat the contract as a subsisting one, they applied for and obtained leave to sue for any breaches of the contract committed by the defendants subsequent to that date.

4. It was not denied that the defendants had ceased to deliver any bran to the plaintiffs after the 9th September 1891, but they sought to justify such non-performance on their part on the ground of an alleged breach by the plaintiffs of that clause in the contract which prohibits them from selling the bran from this mill to Allarakhia Thaver and Meghji Ladha.

5. No evidence was adduced before me of any sale or delivery direct to Allarakhia Thaver and Meghji Ladha, who are merchants carrying on business in partnership and dealing largely in bran. It was, however, admitted that in May 1891 a partnership was formed by certain merchants (among whom were the plaintiffs and Allarakhia Thaver and Meghji Ladha), which went by the name of Allarakhia Thaver's Bhusa Company. The object of the partnership was no doubt to prevent competition and to keep up the price of

1892.

KUVIRJI
NANJI
vs.

UMERSI HARI.

1892.

KUVERJI
NANJI
vs.
UMERSI HARI.

bran. The various partners brought into this company (or pool) all the bran purchased or obtained by them, such bran being credited in the partnership books to the partners bringing it in at the cost price. The bran was then sold by the company and the profits divided among the several partners according to their respective shares.

6. The two parts of the contract of the 29th March 1891 with their translations are sent herewith.

7. The three points arising on the said contracts and on the facts as above stated are :

(1) Whether the plaintiffs can be said to have sold to Allarakhia Thaver and Meghji Ladha in breach of their contract with the defendants?

(2) Whether such portion of the contract restraining such sale was legal under section 27 of the Indian Contract Act or generally under that Act (section 23)?

(3) Whether the alleged breach by the plaintiffs, if proved, affords a good answer to the suit?

8. No question was raised as to the liability of the defendants to pay the Rs. 300 for the gunny bags, and as the defendants Hunsraj Hari admitted that 9 annas, the rate at which the plaintiffs claim, was the ruling rate in September 1891, the defendants did not further dispute the amount of damages. I accordingly gave judgment for the plaintiffs for Rs. 1,940-10-0, the full amount claimed, and costs, and certified Rs. 90 plaintiffs' professional costs, such judgment being made contingent on the opinion of their Lordships on the three questions abovementioned.

JUDGMENT OF THE HIGH COURT—(Bayley, A.C.J., and Farran, J.)

We are of opinion in answer to the third question that the alleged breach by the plaintiffs, if proved, does not afford a good answer to the suit.

It thus becomes unnecessary to answer questions (1) and (2).

MAKHANLAL GOVINDRAM, PLAINTIFF, versus VIJBHUKANDA'S
NAGARDA'S, DEFENDANT ; AND VIJBHUKANDA'S NAGARDA'S,
PLAINTIFF, versus LAKHMINARAYAN MAKHANLAL AND
ANOTHER, DEFENDANTS.

1892.
July 15.

Practice—Amendment of plaint—Changing the cause of action—Plaint for damages for breach of contract to deliver will not support a decree for damages for breach of warranty.

Under a contract for the sale to V. of 100 tons Allahabad and Cawnpore rape-seed, M., the seller, delivered Calcutta rape-seed, which V. accepted and for which he paid 90 per cent of the price. M. sued V. to recover the remaining 10 per cent of the price, and V. filed a cross suit for damages for breach on the part of M. of the contract to deliver. It appeared that the Calcutta rape-seed delivered would be a fair tender under the contract, though subject possibly to a small allowance.

Held, that in V.'s suit for damages for breach of the contract to deliver, a decree could not be passed for damages for breach of warranty.

CASE stated for the opinion of the High Court under section 69 of the Presidency Small Cause Court Act (XV. of 1882) by C. W. Chitty, Chief Judge.

1. In suit No. 17500 of 1891, the plaintiff Makhanlal Govindram sues the defendant Vijbhukandás Nagardás to recover Rs. 1,335-10-9, being the balance, or 10 *per cent*, of the price of certain rape-seed sold by him and delivered to the defendant under two contracts, the first dated the 25th October 1889 for 50 tons Allahabad rape-seed at Rs. 6-7-4½ *per cwt.*, and the second dated 11th December 1889 for 50 tons brown Cawnpore rape-seed at Rs. 6-13-3 *per cwt.*, deliverable in each case in April-May 1890.

2. There is no dispute as to the contracts, but in suit No. 20671 of 1891, Vijbhukandás Nagardás as plaintiff sues to recover from the defendant Makhanlal Govindram a sum of Rs. 1,474-15 as the balance due to him, after giving credit to the defendant Makhanlal Govindram for certain items, for damages sustained in consequence of the non-delivery by the defendant Makhanlal Govindram of the rape-seed under the said two contracts.

3. The defence raised by Vijbhukandás Nagardás, defendant in suit No. 17500 of 1891, was his claim in that suit No. 20671 of 1891, and it was contended on his behalf that if he succeeded in suit No. 20671, suit No. 17500 must be dismissed ; but that if he failed in suit No. 20671 of 1891, a decree in suit No. 17500 of 1891 must be passed against him. I accordingly proceeded to try the second suit first.

1892.

MAKHANLAL
GOVINDRAM
vs.
VIJBHUKAN-
DÁS
NAGARDÁS.

4. On the 30th May 1890 (Saturday), the day before the due date of the said contracts, Makhanlal Govindram, under two delivery orders, delivered to Vijbhukandás Nagardás 100 tons of rape-seed to meet the said contracts, and was paid by him Rs. 11,965, being 90 *per cent* of the price at the contract rate. On the 31st May, in consequence of intelligence received from his godown-keeper, Vijbhukandás Nagardás wrote to Makhanlal Govindram that he did not consider the seed a fair tender, as it was Calcutta and not Allahabad and Cawnpore rape-seed, and requested a return of the Rs. 11,965 paid as abovementioned.

5. On the 31st May Makhanlal Govindram wrote back asking for a survey on the goods and naming Mr. W. Lang as his surveyor. Vijbhukandás Nagardás on the 2nd June named Mr. Stark as his surveyor, but before that letter reached Makhanlal Govindram, he had withdrawn his instructions to Mr. Lang, and declined the proposed survey. Correspondence then passed between the parties, and eventually Mr. Stark held an ex-parte survey, and published his report on the 13th June, in which he pronounced the goods not a fair tender. Further correspondence took place between the parties, but no settlement was arrived at, and eventually Vijbhukandás Nagardás sold the goods by auction on the 6th July 1890, when they realised Rs. 12,303.

6. It will be seen from the plaint and the particulars annexed thereto, that the plaintiff Vijbhukandás Nagardás' claim is based on breach of contract by the defendant Makhanlal Govindram in not delivering rape-seed as required by the said contracts. The particulars are not framed on a correct basis and are somewhat fallacious. It will be seen, for instance, that he has not given Makhanlal Govindram credit for the 10 *per cent* of the price of the rape-seed actually delivered, which must be taken into account in estimating damages.

7. I was of opinion that if Vijbhukandás Nagardás considered that there had been no delivery as required by the contracts he ought to have returned the goods, of which he had taken delivery, to Makhanlal Govindram, and to have demanded a return of the Rs. 11,965 paid; and, if the money were not returned, to have sued Makhanlal Govindram in the High Court to recover the same together with the amount of the damage (if any) sustained by him

in consequence of such non-delivery. Vijbhukandás Nagardás did not, however, return the goods, or even tender the same in return to Makhanlal Govindram, but kept them until the auction-sale in July. The delay, however, in selling the goods was due to negotiations between the parties, and I do not think that that should be allowed to prejudice Vijbhukandás Nagardás in any way.

8. The evidence of the plaintiff Vijbhukandás Nagardás and his witnesses was directed entirely towards a breach of the contracts to deliver, and, having regard to the fact that the delivery was actually made as above stated, I was of opinion that the claim of the plaintiff on that basis could not be substantiated. The goods supplied were Calcutta rape-seed, an inferior quality, averaging 4 annas a hundredweight less than the quality contracted for. Under these circumstances I thought that the plaintiff might be able to substantiate a claim for damages for breach of warranty, but that it could not be so substantiated in the present suit, as it would be in effect a different cause of action. The plaintiff's counsel maintained that I could, on the plaint and evidence, give a verdict for damages for breach of warranty, but I was of opinion that that would be allowing the plaintiff to completely change the nature of his suit, and that that could not be done by amendment of the plaint and proceedings.

9. I therefore allowed the plaintiff Vijbhukandás Nagardás to withdraw Suit No. 20671 of 1891, with leave to file a fresh suit for the breach of warranty, and passed a decree in Suit No. 17500 of 1891 for the plaintiff for the amount claimed, execution being stayed to allow of the fresh suit (if brought by Vijbhukandás Nagardás) being heard and determined.

10. At the request of counsel for the plaintiff Vijbhukandás Nagardás, I made the above order and judgment contingent on the opinion of their Lordships on the following questions :

(1) Whether in suit No. 20671 of 1891 on the plaint as framed, and the particulars, a decree could be passed for damages for breach of warranty ?

(2) Whether if the goods were not a fair tender, that did not amount to a breach of the contract to deliver ?

11. The second question seems to require some explanation. Mr. Stark, the surveyor for Vijbhukandás Nagardás, surveyed the goods

1892.

MAKHANLAL
GOVINDRAM
vs.
VIJBHUKAN-
DÁS
NAGARDÁS.

1892.

MAKHANLAL
GOVINDRAM
vs.
VIJBHUKAN-
DÁS
NAGARDÁS.

ex-parte and declared them not a fair tender. When cross examined on the point he gave no reasons for his opinion, and it was not satisfactorily proved before me that the goods were not a fair tender, or that an allowance of 4 annas per hundredweight would not have been sufficient to meet the case. The plaintiff Vijbhukandás Nagardás admitted that Calcutta rapeseed was purchased by him to mix with other qualities in order to make up the quality required.

JUDGMENT OF THE HIGH COURT—(Bayley, A.C.J., and Farran, J.)

We are of opinion, in answer to the first question, that in Suit No. 20371 of 1890 on the plaint as framed, and the particulars, a decree could not be passed for damages for breach of warranty. We are of opinion that the case stated does not afford materials to enable the Court to give an opinion on the second question, and it is unnecessary to decide it having regard to our opinion on the first question.

1892.
Aug. 12.

J. G. SMITH AND OTHERS, PLAINTIFFS, versus LUDHA GHELLA
DAMODAR, DEFENDANT.*

Contract—Construction—Custom or usage qualifying contract—Evidence—Evidence Act (I. of 1872), section 92, proviso 5—"Shipment," meaning of—Arbitration—Appointment of umpire by arbitration—Mode of appointment prescribed by contract—Delegation by arbitrators of their right to appoint umpire.

On 18th April 1890, the defendant signed a contract (No. 3053) to buy from the plaintiffs twenty-five bales grey dhoties "June shipment, in four lots, with an interval of four weeks." These goods were not supplied, as they could not be obtained at the price limited. On 24th September 1890, the defendant gave the plaintiffs an order at an increased limit of price in the following terms: "Please telegraph your Manchester friends to purchase on my account twenty-five bales grey dhoties relating to No. 3053 at an all-round advance of 1d. per pair on original limits for November-December-January shipments, in three monthly lots, about eight bales to be shipped in each month." This order was accepted, and the goods were shipped as follows—6 bales were handed to the carriers (the L. & N. W. Railway Company) in Manchester on the 28th November 1890, and were shipped at Birkenhead on the 9th December 1890; six bales were handed to the same carriers on the 4th December 1890, and were shipped on the 18th December 1890; ten bales were handed to the same carriers on the 23rd December and one bale on the 24th December, and these eleven bales were shipped on the 6th January 1891. The defendant refused to accept the goods. He contended that the documents of the 18th April and 25th September should be read

* Reported at I. L. R. 17 Bom. 129.

together, and that the final contract was for November-December-January shipment in three monthly lots at intervals of four-weeks. He also contended that the shipment on the 9th December 1890 was a late shipment, and that he was not therefore bound to accept the goods under the contract. As to this last contention the plaintiffs alleged that by the custom of Bombay, in the case of contracts made with members of the Native Piece-goods Association, the date of the carrier's weight note was to be regarded as the date of shipment, and that under such a contract as the one in question, delivery to the Railway Company or other inland carrier was equivalent to shipment. This custom, it was alleged, originated in consequence of the above Association having agreed that all piece-goods ordered out by its members should be conveyed to Bombay by certain lines of steamers only and by no others. It was stated that, unless some such custom existed, it would in many instances be impossible for Bombay merchants to carry out their contracts, as no steamers of the selected lines might be available. The Judge of the Court of Small Causes at the hearing found that the alleged custom existed, and was generally accepted and understood by merchants and dealers in Bombay. On reference to the High Court,

Held, (1) That the contract finally agreed on was, that twenty-five bales relating to No. 3053 (*i. e.* the document of the 18th April) should be purchased on defendant's account at an all-round advance of 1*d.* per pair on the original limits. Such bales to be shipped in the manner and at the times mentioned in the document of the 24th September 1890.

(2) That evidence of the alleged custom, or usage of trade, was not admissible under section 92, proviso (5), of the Evidence Act (I. of 1872) to explain or vary the natural and ordinary meaning of the words in the contract. The parties contracted for a shipment on board of a ship or steamer and to allow evidence of usage that a delivery to a railway company at an inland town should be regarded as equivalent to shipment on board a vessel at a seaport town would be to allow evidence of usage repugnant to, or inconsistent with, the express terms of the contract.

The contract in question provided that disputes between the parties were to be referred to the arbitration of two merchants, and that, should the arbitrators be unable to agree, they should appoint an umpire. The plaintiffs and defendant referred their dispute to two arbitrators. These arbitrators disagreed in their report, and referred the case to the Bombay Chamber of Commerce for the appointment of an umpire. The Chamber of Commerce appointed an umpire who made his award.

Held, that the appointment of the umpire was invalid. The arbitrators could not delegate the power of appointment conferred on them by the contract.

CASE stated for the opinion of the High Court under section 69 of the Presidency Small Cause Court Act (XV. of 1882) by C. W. Chitty, Chief Judge.

1. In this case the plaintiffs sue to recover Rs. 2,000, part of a sum of Rs. 2,112-1-3, as damages sustained by them in consequence of the defendant's failure to take delivery of, and pay for, twenty-five bales grey dhoties which he had agreed to purchase from the plaintiffs.

1892.

J. G. SMITH
vs.
LUDHA
GHILLA
DAMODAR.

1892.

J. G. SMITH
vs.
LUDHA
GHELLA
DAMODAR.

2. The contract with the plaintiffs was admitted by the defendant, though a question was raised as to the proper construction to be put upon it. On the 18th April 1890, the defendant signed a contract (No. 3053) on the printed form of the plaintiff's office for the purchase of twenty-five bales grey dhoties "June shipment, in four lots, with an interval of four weeks." The goods could not be obtained at the defendant's limit, and so were not supplied. On the 24th September 1890, the defendant gave to the plaintiffs an order, at an increased limit, in the following terms: "Please telegraph your Manchester friends to purchase on my account twenty-five bales grey dhoties relating to No. 3053, at an all-round advance of 1*d.* per pair on original limits for November-December-January shipment, in three monthly lots, about eight bales to be shipped in each month. Reply in ten days."

3. The last mentioned order was accepted, and the goods supplied, and shipped as follows: six bales were handed to the carriers (the L. & N. W. Railway Company) in Manchester on the 28th November 1890, and shipped at Birkenhead on the 9th December 1890, per s. s. "Clan Graham"; six bales were handed to the same carriers on the 4th December 1890 and shipped per s. s. "Branksome Hall" on the 13th December 1890; ten bales were handed to the same carriers on the 23rd December and one bale on the 24th December, and these eleven bales were shipped per s. s. "Werneth Hall" on the 6th January 1891.

4. The defendant contended that the documents of the 18th April and 24th September must be read together, and that the final contract was for November-December-January shipment, in three monthly lots, at intervals of four weeks. This can hardly have been intended, the two arrangements being inconsistent, and incapable of being taken as one, *e. g.* if goods were shipped on 1st November (which would satisfy the term November shipment) the next shipment would have to be made on the 29th November and not in December at all, and the third in December and not in January. It was further contended on behalf of the defendant that the shipment per s. s. "Clan Graham" was a late shipment, and that, consequently, the defendant was not bound to accept the goods under the contract.

The question whether the said shipment was late or not, depends on the further question, whether or not by the custom of Bombay,

in the case of piece-goods ordered out by members of the Native Piece-goods Association, and shipped by one of the Conference steamers, the date of the carrier's weight note must be regarded as the date of the shipment. This was the main point in issue in the case, and my finding on it is given in the following paragraphs.

5. It was proved before me that some six years ago the Native Piece-goods Association took for the first time to arranging their own freight contracts and by an agreement with four lines of steamers (which has since been renewed from time to time as required) they agreed that all piece-goods ordered out by members of the Association should be conveyed to Bombay by steamers of those four lines only and no others. It was after, and in consequence of, this action on the part of the piece-goods dealers that the alleged custom arose. The reason for it is obvious, as, unless some such custom existed, or express provision was made to meet the case, it would in many instances be impossible for merchants in Bombay to carry out their contracts. Goods, for instance, ordered for a January shipment, might be sent to Birkenhead early in the month, and, because no Conference steamer was ready before the 31st, might be detained in Birkenhead until February, and so the contract would not be complied with. To meet this difficulty it is alleged that it has, for the last six years or thereabouts, been the custom to treat the date of the carrier's weight note in Manchester as the date of shipment for the purposes of carrying out such contracts. As to the existence of such a custom, a large body of evidence was given before me by gentlemen, partners or assistants of trading firms in Bombay. This testimony was unanimous as to such custom obtaining in Bombay, while on the other hand not a single witness was called on the part of the defendant to disprove it. Of course, the onus lies on the plaintiffs to prove a custom on which they rely, but it seems curious that if no such custom existed, ample testimony should not be found to meet that given on the plaintiff's behalf.

6. It was contended for the defendant that no specific instances could be shown where such custom had been objected to, and had been forced on an unwilling party. Though, no doubt, such evidence would be valuable, I did not consider it absolutely essential. If it were a custom which in itself was so reasonable and universally

1892.

J. G. SMITH

vs.

LUDHA

GHELLA

DAMODAR.

1892.

J. G. SMITH

vs.

LUDHA

GHELLA

DAMODAR.

accepted, that no one had ever disputed it, it could never be proved in a Court of Law. At the same time almost all the witnesses stated that complaints had been made in their office by dealers on account of late shipment, but that the dates of the carrier's weight notes were always accepted by such dealers as equivalent to the dates of shipment. Then, again, it was contended that the fact that firms inserting a clause in their contracts expressly stipulating that the date of the carrier's weight notes should count as the date of shipment showed that no such general custom existed. The evidence before me, however, went to show that such a practice was by no means universal, and that when inserted, it was so inserted *ex majori cautela*, and not in any way from ignorance of, or disregard for, the general custom. On the evidence, therefore, before me, I am clearly of opinion that the custom, as alleged, does exist, and has existed for some years past, and been generally accepted and understood by both merchants and dealers in Bombay.

7. It was contended on behalf of the defendant by his counsel (but not till he commenced to open his case), that evidence of such a custom was inadmissible under section 92 of the Evidence Act. The objection was taken, it is true, by the pleader for the defendant during the examination *de bene esse* of one of the plaintiff's witnesses on the 14th January 1892, but was not then pressed and was never taken during the hearing of the plaintiff's case. It cannot, I think, be successfully maintained, and if not, it follows that the first shipment by the s.s. "Clan Graham" was in time, and that the defendant was not justified in refusing the goods.

8. The goods on arrival in Bombay were tendered to the defendant in the usual course, and he refused to accept them on the ground of late shipment. Much correspondence ensued, the plaintiffs insisting on an arbitration in terms of their contract. The goods were, in fact, surveyed *ex parte* by Mr. Black on behalf of the plaintiffs, but the plaintiffs afterwards consented to cancel that report, and the matters in dispute—*i. e.* defective quality and late shipment—were referred to two arbitrators, Mr. O. Schilizzi for the plaintiff and Mr. Purshotum Kuverji for the defendant. On the 4th of August 1891, after these gentlemen had held their survey, but before they made their report, the defendant wrote saying that the notice for arbitration was too short; that, contrary to arrange-

ment, Mr. Black's report had been shown to the arbitrators, and that he repudiated the arbitration proceedings. There is, I may mention, no evidence of any such arrangement as alleged. On the 5th August 1891, the arbitrators published their report, but as they disagreed they referred it to the Chamber of Commerce in the usual way to appoint an umpire. Mr. J. L. Symons, of Finlay, Muir, and Company, was accordingly appointed, and after survey reported that the goods were a fair tender against the contract, that the dates of the carrier's notes must be taken as the dates of shipment, and that the slight irregularity must be met by the adjustment proposed in plaintiff's letter of the 27th April 1891, *i. e.* to allow interest and exchange on the shipment as of intervals of thirty days. It was proved before me that the defendant would not be in any way prejudiced by the third shipment being made too early, especially if, as suggested by Mr. Symons, an allowance was made to him in terms of the plaintiff's letter of 27th April 1891 in respect of interest and exchange.

9. The defendant declined to be bound by the said award, and the plaintiffs accordingly filed this suit.

10. As to the amount of damages there was practically no dispute raised before me. It also appeared that if the calculations were made on the basis suggested by the said letter of 27th April 1891 and Mr. Symons' award, owing to the difference of exchange, the result would be to slightly increase the sum due to the plaintiffs, and it would not, therefore, affect the amount of their claim in this suit, which cannot exceed Rs. 2,000.

11. The defendant's counsel requested me to state a case for the opinion of their Lordships on the questions of law arising in the case. In accordance with the practice of late adopted by Mr. Hart, I set out the questions submitted on behalf of the defendant, which are as follows :

(1) What is the proper construction of the two documents of the 18th April and the 24th September 1890 ?

(2) Did the plaintiffs carry out the contract by shipping goods on the 9th and 13th December and 6th January 1891 ?

(3) Is evidence admissible to prove that the word "shipment" and "to be shipped" have any other meaning than their plain and ordinary and accepted meaning ?

1892.

J. G. SMITH
vs.
LUDHA
GHELLA
DAMODAR.

1892.

J. G. SMITH
 vs.
 LUDHA
 GHILLA
 DAMODAR.

(4) If so, has the mercantile usage in Bombay, under which plaintiffs contend that, in contracts for Manchester goods, "shipment" means and includes delivery to carrier at Manchester, been proved in absence of proof of specific instances?

(5) If the first shipment was not in time under the contract, was defendant bound to take delivery of the two later shipments?

(6) If the evidence of custom was admissible, and the date of the carrier's weight note is to be taken as the date of shipment, was defendant bound to take delivery of the third shipment, those goods being admittedly delivered to the carrier on 23rd and 24th December 1890?

(7) Does the arbitration clause in the contract preclude defendant from setting up any legal defences he may have to the action?

(8) Was the reference made by the arbitrators of the matters in dispute to the Chamber of Commerce within the terms of the arbitration clause?

(9) Is the defendant bound by the award made by Mr. Symons?

(10) Had not the defendant right to withdraw from arbitration any time before award, and if so, did not his attorney's letter of 4th August 1891 operate as a withdrawal?

(11) Whether the plaintiff not having filed this suit on the award, the parties are not relegated to their legal rights under the contract?

12. Some of the questions appear to me to be open to objection, and they do not state exactly the points requiring decision. The first must be regarded only as far as it deals with the dates and mode of shipment. The second deals with a question of fact depending on my finding on the above mentioned custom. The third was taken late but is open to no other objection. The fourth is a question of fact. The answer to the fifth is too obvious to require remark. The last five deal with the question of arbitration. With regard to that, it may be mentioned that the defendant, by his letter of the 4th August 1891, declined to be bound by the award, and also that, though the contract provided for the umpire to be chosen by the arbitrators, he was, in fact, chosen by the Chamber of Commerce, to whom the arbitrators referred the matter in the usual course for that purpose.

13. The questions of law arising on the above facts, and requiring decision, seem to me to be as follows:

(1) What is the proper construction of the two documents of the 18th April 1890 and 24th September 1890, especially with regard to the time and mode of shipment?

(2) Is evidence admissible to prove that the words "shipment" and "to be shipped" have any other meaning than their plain, ordinary, and accepted meaning?

(3) If such evidence is admissible and the date of the carrier's weight note is to count as the date of shipment, was defendant bound to take delivery of the third shipment, the goods being admittedly delivered to the carriers on the 23rd and 24th December 1890?

(4) Is the defendant bound by the award of Mr. J. L. Symons, having regard to the informality in his appointment as umpire, or having regard to the defendant's contention in his letter of the 4th August 1891?

(5) Are the plaintiffs precluded from relying on such award, because their particulars of claim were not calculated on the basis so awarded?

14. I have reserved judgment in this case until the decision of their Lordships on the above questions has been received.

Rivett Carnac for defendant.

Scott for plaintiffs.

The following cases were cited: *Bowes vs. Shand*⁽¹⁾; *Re Rouse & Meier*⁽²⁾; *Koegler vs. Coringa Oil Company*⁽³⁾; *Re Hopper*⁽⁴⁾; *Ireland vs. Livingston*⁽⁵⁾; *Spicer vs. Cooper*⁽⁶⁾; *Simpson vs. Crippin*⁽⁷⁾; *Brandt vs. Lawrence*⁽⁸⁾.

JUDGMENT OF THE HIGH COURT.

BAYLEY, C.J. — Upon this reference under section 69 of the Presidency Small Cause Courts Act (XV. of 1882), the first question to be considered is, what is the proper construction of two documents, dated the 18th April 1890 and 24th September 1890, by which the

1892.

J G. SMITH
vs.
LUDHA
GHELLA
DAMODAR.

(1) L. R. 2 A. C. 455.

(3) I. L. R. 1 Cal. 42.

(5) L. R. 5 E. & I. 395.

(7) L. R. 8 Q. B. 14.

(2) L. R. 6 C. P. 212.

(4) L. R. 2 Q. B. 367.

(6) 1 Q. B. 424.

(8) L. R. 1 Q. B. D. 344.

1892.

J. G. SMITH
VS.
LUDHA
GHEILA
DAMODAR.

defendant agreed to purchase twenty-five bales of grey dhoties, and which on their arrival in Bombay the defendant refused to take delivery of and pay for.

On the 18th April 1890, the defendant signed a contract, No. 3053, on the printed form of the plaintiffs' office for the purchase of twenty-five bales grey dhoties "June shipment, in four lots, with an interval of four weeks." It is stated in the case that the goods could not be obtained at the defendant's limits, and so were not supplied. On the 24th September 1890 the defendant gave to the plaintiffs an order at an increased limit in the following terms: "Please telegraph your Manchester friends to purchase on my account twenty-five bales grey dhoties, relating to No. 3053, at an all round advance of 1*d*. per pair on original limits, for November, December, and January shipment, in three monthly lots, about eight bales to be shipped in each month." In the original document of the 24th September 1890, which was handed to us during the argument, the word "each" in that sentence is underlined.

The last mentioned order was accepted, and the goods were shipped and supplied as follows: six bales were handed to the carriers (the L. & N. W. Railway Company) in Manchester on the 28th November 1890, and shipped at Birkenhead on the 9th December following per s. s. "Clan Graham"; eight bales were handed to the said carriers on the 4th December 1890, and shipped per s. s. "Branksome Hall" on the 13th of that month; ten bales were handed to the same carriers on the 23rd December and one bale on the 24th December, and these eleven bales were shipped per s. s. "Werneth Hall" on the 6th January 1891.

The case stated that the defendant contended that the documents of the 18th April and 24th September must be read together, and that the final contract was for November, December, and January shipment, in three monthly lots, at intervals of four weeks.

I think that such contention is quite untenable. The provision as to the interval of four weeks referred solely to the contemplated June shipment mentioned in the first document, the goods for which could not be obtained at the defendant's limits, and so were not supplied. The times and mode of shipment of 25 bales were those specified in the document of the 24th Sept-

ember, namely for November, December, and January shipment, in three monthly lots, about 8 bales to be supplied in each month. The second document refers to the previous one, and the contract finally agreed on was to purchase on the defendant's account 25 bales relating to No. 3053 (*i. e.* the document of the 18th April) at an all round advance of 1*d.* per pair on the original limits, such bales to be shipped in the manner, and at the times, mentioned in the document of the 24th September.

It was stated in the House of Lords in *Bowes vs. Shand*⁽¹⁾ to be perfectly well settled that the construction of a contract, unless there be something peculiar to the words by reason of the custom of the trade to which the contract relates, is for the Court, *i. e.* as distinct from the jury.

Mercantile contracts of sale often contain a stipulation that goods are to be shipped within or during a certain time specified in the contract, and it has been held by the highest authority that it is a condition precedent that the goods shall be so shipped, the time of shipment forming part of the description of the goods. Some difficulty has been found in the interpretation of the expression "to be shipped" or "shipment" within a certain time. But it was finally settled in the case just cited that such expression means that the goods shall be placed on board ship during the time specified, according to the natural meaning of the words in the absence of any trade usage to alter that meaning.

This view was arrived at in *Bowes vs. Shand*,⁽¹⁾ but not till after very eminent Judges had previously come to a different conclusion as to the correct construction of the contract in dispute in that case. The two contracts there were made in London for the sale of 600 tons of rice (each for the sale of 300 tons of rice) to be supplied at Madras or Coast during the months of March ^{and} or April 1874, per "Rajah of Cochin." All the rice had been put on board and bills of lading given for it, in February, except as to 4 tons of rice, which were put on board in March. In an action for refusing to accept the rice, the defence was that it had not been shipped during the

1892.

J. G. SMITH
vs.
LUDHA
GHELLA
DAMODAR.

(1) L. R. 2 A. C. 455.

1892.

J. G. SMITH
vs.
LUDHA
GHELLA
DAMODAR.

months of March ^{and}_{or} April. The House of Lords, reversing the judgment of the Court of Appeal,⁽¹⁾ held that the contract had not been complied with, that its words must be construed in their plain and ordinary sense; that evidence of any usage in the particular trade must, to affect their meaning, be very clear and consistent, and such evidence not having been given the plaintiffs could not recover on the contract.

In the present case it was contended by the defendant that the shipment of the first of the three monthly lots per s. s. "Clan Graham" at Birkenhead on the 9th December 1890 was a late shipment, not having been shipped in November, and that consequently he was not bound to accept the goods under the contract.

The plaintiffs met, or endeavoured to meet, that objection by alleging and calling evidence to prove that for the last six years or thereabout, it had been the custom in Bombay, in the case of piece-goods ordered out by members of the Native Piece-goods Association (to which, as admitted during the argument before us, the defendant belonged), and shipped by one of the Conference steamers, to treat the date of the carrier's weight note in Manchester as the date of the shipment for the purpose of carrying out such contracts. The Chief Judge states that a large body of evidence was given before him by gentlemen, partners or assistants of trading firms in Bombay, while, on the other hand, not a single witness had been called on the part of the defendant to disprove it. The Chief Judge, on the evidence before him, was clearly of opinion that the custom as alleged did exist, and had existed for some years past, and been generally accepted and understood by both merchants and dealers in Bombay.

I am clearly of opinion that evidence of such a custom or usage of trade is not admissible to explain or vary the natural and ordinary meaning of the words in the contract in the present case.

By section 92, proviso (5), of the Indian Evidence Act (I. of 1872), 'any usage or custom by which incidents not necessarily mentioned in any contract, are usually annexed to contracts of that description may be proved, provided that the annexing of such incidents would not be repugnant to, or inconsistent with, the express terms of the contract.'

(1) L. B. 2 Q. B. D. 112.

As already noticed, the document of the 24th September refers to the one of the 18th April, and by one of the clauses of the printed portion of the document of the 18th April, "all goods except metals are to be shipped per steamers in accordance with indentor's freight contracts." I think that by "shipment" in the document of the 24th September is meant the same as "to be shipped per steamers" in the earlier document. The parties had, in my opinion, contracted for shipment on board of a ship or steamer, and to ask that delivery to the Railway Company at an inland town may be treated as equivalent to a shipment on board a vessel at a seaport town is, in my opinion, repugnant to, or inconsistent with, the express terms of the contract, and that evidence of such custom or usage of trade is in a contract like the present clearly inadmissible.

Reference was made during the argument in this Court to section 98 of the Evidence Act, which states that 'evidence may be given to show the meaning of . . . local and provincial expressions . . . and of words used in a peculiar sense.'

The evidence in the present case does not, from the statement of it by the Chief Judge, appear to have been given for the purpose of showing that the word "shipment" was used in a peculiar sense, but to prove a custom to treat the date of the carrier's weight-note in Manchester as the date of shipment at Birkenhead or Liverpool, for purposes of carrying out such contracts as the present one.

The defendant here, a Hindu, had stipulated by a document written in the English language for "shipment" in three monthly lots in three specified months, and to such he was entitled. As stated by the Lord Chancellor (Lord Cairns) in *Bowes vs. Shand*,⁽¹⁾ 'it is a mercantile contract, and merchants are not in the habit of placing upon their contracts stipulations to which they do not attach some value and importance.'

The portions of the Indian Evidence Act which I have quoted merely reproduce the English law on the subject, the Act itself, to use the language of Sir James F. Stephen, who framed it, being 'little more than an attempt to reduce the English Law of Evidence to the form of express propositions arranged in their natural order, with some modifications rendered necessary by the peculiar circum-

1892.

J. G. SMITH
ES.
LUDHA
GHELLA
DAMODAR.

(1) L. R. 2 A. C. 463.

1892.
 J. G. SMITH
 vs.
 LUDHA
 GHILLA
 DAMODAR.

stances of India.' (Introduction to the Indian Evidence Act, page 2.)

The next point for consideration is that raised in the fourth question put by the Chief Judge, namely, Is the defendant bound by the award of Mr. J. L. Symons, having regard to the informality in his appointment as umpire, or having regard to the defendant's contention in his letter of the 4th August 1891?

In the document of the 18th April it is provided that disputes of whatever nature are to be referred to the arbitration of two merchants, and that should the arbitrators be unable to agree they shall appoint an umpire.

The arbitrators published their report, but, as they disagreed, they referred it to the Chamber of Commerce (the Chief Judge states 'in the usual way') to appoint an umpire. Mr. Symons was accordingly appointed and made his award.

I think that such appointment was clearly bad. By the document of the 18th April one of each of the two merchants who were to act as arbitrators was to be appointed by each party, and such arbitrators, if unable to agree, were to appoint an umpire. The arbitrators were themselves to exercise the authority thus conferred upon them, and could not delegate such power to any one else. Consequently, the appointment of an umpire in a manner totally different from that which the parties had agreed for, was, in my opinion, an invalid appointment. The case of *Re Hopper*,⁽¹⁾ relied upon by Mr. Scott for the plaintiffs in the argument before us, is no authority in support of the validity of the appointment of Mr. Symons by the Chamber of Commerce. In that case two arbitrators not being able to agree in the appointment of an umpire cast lots as to which of two persons nominated by them should be appointed umpire. There was, therefore, as Cockburn, C.J., said in his judgment (page 375), a concurrent judgment as to the fitness of the person who was finally appointed, and when the arbitrators have come to such a concurrence and the only difference between them is as to which of the two they shall appoint, and the appointment is settled by lots, such a case falls directly within the decision of *Neal vs. Ledger*,⁽²⁾ a case upheld by

(1) L. R. 2 Q. B. 367.

(2) 16 East, 51.

the Court of Common Pleas in *European and American Steam Navigation Company vs. Croskey*.⁽¹⁾

In the present case the arbitrators nominated no one as umpire, but left that duty to be performed by third parties, namely the Chamber of Commerce.

Such being my view, the fifth question raised by the Chief Judge requires no answer.

The question of law referred by the Chief Judge for our decision I would therefore answer thus :

To question (1) That the proper construction of the two documents of the 18th April and 24th September 1890 is, that twenty-five bales grey dhoties relating to No. 3053 (*i.e.* the document dated 18th April), at an all round advance of 1*l.* per pair on the original limits were to be shipped in the steamers in November, December, and January, in three monthly lots, about eight bales to be shipped in each of those months.

(2) That, with regard to this particular contract, evidence was not admissible to prove that the words "shipment" and "to be shipped" have any other meaning than their plain and ordinary meaning.

(3) This question does not require to be answered.

(4) That the defendant is not bound by the award of Mr. J. L. Symons, having regard to the informality in his appointment as umpire.

(5) This question does not arise.

FARRAN, J.—I agree in the answers which the Chief Justice proposes to give to the questions in this case, and do not, as to the first question, wish to add anything to what he has said.

The second question is a very important one, and I desire to add a few words expressing my reasons for the opinion I have arrived at regarding it. That question as propounded is, I think, too wide to justify us in answering it in its actual words. It must be read in connection with the facts stated in the case, which narrow it to this :—Whether evidence of a usage in the Bombay piece-goods trade is admissible to explain the phrase "November-December."

1892.

J. G. SMITH
vs.
LUDHA
GHELLA
DAMODAR.

(1) 8 C. B. (N. S.) 397.

1892.

J. G. SMITH
vs.
LUDHA
GHELLA
DAMODAR.

January shipment," and "bales to be shipped in each month" so as to alter its meaning into "November, December, January delivery to railway carriers at Manchester" and "bales to be so delivered in each month." Such evidence can only be tendered under section 92, provision (5), or under section 98 of the Evidence Act. Under the earlier section and provision the instrument is read in its ordinary sense, but the custom or usages of a peculiar trade may add an incident to the contract. This is in accordance with English law. The rule and reason for it are laid down and explained with lucidity by Parker, B., in delivering the judgment of the Exchequer Chamber in *Hutton vs. Warren*.⁽¹⁾ "It has been long settled" (said his Lordship) "that in commercial transactions extrinsic evidence of custom and usage is admissible to annex incidents to written contracts in matters with respect to which they are silent. The same rule has been applied to contracts in other transactions of life in which usages have been established and prevailed, and this has been done upon the principle of presumption, that in such transactions the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but to contract with reference to those known usages." This evidence is only receivable when the incident, which it is sought to import into the contract, is consistent with the terms of the written instrument. If inconsistent, the evidence is not receivable, and the inconsistency may be evinced (*a*) by the express terms of the written instrument, or (*b*) by implication therefrom (see per Blackburn, J., in *Myers vs. Sarl*)⁽²⁾. These latter rules the Evidence Act adopts in enacting in proviso (5) that the annexing of such incident shall not be repugnant to or inconsistent with the express terms of the contract. In the case before us, to prove a usage, that, under a contract which expressly provides that there shall be a shipment in a particular month, delivery to an inland carrier will satisfy the contract, is to prove a usage which does not add an incident to the contract in respect of which the contract is silent, but one which goes to establish that the performance in a different manner from that stipulated for is a performance of it. This is in contradiction to the express terms of the written instru-

(1) 1 M. & W. at p. 474.

(2) 2 E. & E. 306 at p. 320.

ment. The evidence of such a usage is, therefore, not admissible under proviso (5) of section 92.

Is the evidence, then, admissible under section 98, which enacts that "evidence may be given to show the meaning of . . . words used in a peculiar sense"? Mercantile usage is in such a case "the mercantile dictionary in which you are to find the mercantile meaning of the words which are used." *Per* Lord Cairns, L.C., in *Bowes vs. Shand*.⁽¹⁾ In such a case the evidence cannot properly be said to vary the contract, it only explains the meaning in which the mercantile terms in it are used. The difficulty here is that this is not what the case states as the result of the evidence. The custom set up is, that the date of the carrier's weight-note must be regarded as the date of shipment. It is not alleged that the word "shipment," which is the equivalent of "putting on board a ship" (see *Bowes vs. Shand*), has acquired in the Bombay piece-goods trade a technical meaning, or that it is used in a peculiar sense. What is alleged is that a delivery to an inland carrier is treated in the case of contracts made with members of the "Native Piece-goods Association" (of which the defendant is one), as equivalent to a performance of a contract to ship. It is not alleged that the words "to ship" have acquired the technical meaning of putting in a railway truck. I am not prepared to say that the expressions "to ship" and "shipment" may not acquire a meaning in a peculiar trade different from their plain, ordinary, and accepted meaning, and that evidence of such meaning may not be given under section 98 of the Evidence Act, but I think that the evidence given in this case (being of the nature that it is) is not admissible for that purpose.

The third question does not arise.

I agree as to the fourth question; the answer must be in the negative. The contract provides for the arbitrators in case of difference appointing an umpire. It is not a compliance with such a provision for the arbitrators to refer the matter to the Chamber of Commerce, and for the latter body to select a gentleman to deal with the dispute. The case of *Re Hopper*⁽²⁾ has no application to the facts before us. There the arbitrators appointed an umpire.

1892.

J. G. SMITH
VS.
LUDHA
GHELLA
DAMODAR.

(1) L. R. 2 A. C. at page 468.

(2) L. R. 2 Q. B. 367.

1892.

J. G. SMITH

ES.

LUDHA

GHELLA

DAMODAR.

It was sought to treat that appointment as bad, on the ground that the arbitrators had decided by lot which of the two persons selected for appointment by the arbitrators respectively should be appointed. The Court ruled that, under the circumstances, the appointment of the umpire was unimpeachable. Here the arbitrators made no appointment at all. They referred the whole matter to the Chamber of Commerce. That body are said to have dealt with it 'in the usual way.' That is not the contract. What the parties contracted for, was that the arbitrators should appoint an umpire. It is unnecessary, in this view, for me to express an opinion as to the right of the defendant to withdraw from the arbitration, or whether, in fact, he did so. I wish for myself to say that I do not agree that it is law in India that one of the parties to a written reference can recede from it without cause before award. The case of *Pestonji vs. Manockji*⁽¹⁾ is an authority to the contrary. *Koegler vs. The Coringa Oil Company*⁽²⁾ has no bearing upon the question. There one of the parties did not, in fact, appoint an arbitrator at all.

Attorneys for plaintiffs — *R. S. Brown & Co.*

Attorneys for defendant—*Balkrishna and Perozeshaw.*

1892.

Sept. 2.

MOTILAL BECHARDAS AND OTHERS, PLAINTIFFS, versus GHELLA-BHAI HARIRAM AND OTHERS, DEFENDANTS; AND BHANA LALA AND OTHERS, PLAINTIFFS, versus DADABHAI SAGUNBAKSH AND OTHERS, DEFENDANTS.*

Partnership—Death of partner—Suit by firm for a debt accrued due during his life—His representatives need not be parties—Hindu joint and undivided family—Practice—Parties—Indian Contract Act (IX. of 1872) section 45.

The representatives of a deceased partner are not necessary parties to a suit for the recovery of a debt which accrued due to the partnership in the life-time of the deceased partner.

If they were, generally speaking, necessary parties, the rule would not apply in the case of a joint and undivided Hindu family carrying on business in partnership, where the debt was in its nature a family debt.

(1) 12 M. I. A. 112.

(2) I. L. R. 1 Cal. 42.

* Reported at I. L. R. 17 Bom. 6.

CASE stated for the opinion of the High Court under section 69 of the Presidency Small Cause Courts Act (XV. of 1882) by C. W. Chitty, Chief Judge.

1. In this case the plaintiffs, sons of Bechar Nagar, deceased, sue to recover a sum of Rs. 545-7-0 as the balance of an agency account for goods purchased and moneys paid by the plaintiffs on account of goods in Bombay, from *Magha Vud* 3rd to *Jesth Sud* 5th 1945 (18th February to 3rd June 1883).

2. The defendant took the preliminary objection that Bechar Nagar was a member of the firm when the debt accrued due; that he died about a year ago; that his representatives were not joined, and that no probate, or letters of administration, or certificate to his estate had been taken out.

3. It was proved that the plaintiffs, five brothers, and their father carried on a joint business in the name of Bechar Nagar at Surat. They were members of a joint and undivided Hindu family, but the said Bechar Nagar had no brothers or nephews. The said Bechar Nagar died a year ago after the accrual of the debt in question.

4. The question for decision in this case is the same as that in suit No. 1682 of 1892, which is sent with this, namely, whether under section 45 of the Contract Act the representatives of a deceased partner are necessary parties to a suit for the recovery of a debt which accrued due to the partnership in the lifetime of the deceased partner.

5. If the above question be decided in the affirmative, the further question also arises in this case, whether such a rule would apply in the case of a joint and undivided Hindu family carrying on a business in partnership.

6. This case is stated on the application of the defendants, and I have postponed the hearing of the suit pending the decision of their Lordships on the above points.

Russell for plaintiffs in suit No. 15099 of 1891.

Anderson (at the request of the Court) for defendant.

The parties in the second suit (No. 1682 of 1892) were not represented by counsel.

1892.

MOTILAL
BECHARDAS
vs.
GHELLABHAI
HARIRAM.

1892.

MOTILAL
BECHARDAS
VS.
GHELLABHAI
HARIRAM.

JUDGMENT OF THE HIGH COURT (Bayley, C.J., and Farran, J.)

Upon the first question referred for our opinion in this case there is a conflict of decision between the High Court of Calcutta and the High Court of Allahabad. The latter Court has held that the surviving partners in a firm can sue for a debt due to the partnership without joining the representatives of a deceased partner as plaintiffs : *Govind Prasad vs. Chunder Sekhar*.⁽¹⁾ The Calcutta High Court has ruled that the representatives of a deceased partner are, in such a case, necessary parties to the suit : *Ram Narain vs. Ram Chunder*.⁽²⁾

The question as to what plaintiffs should join in suing to enforce a joint right is not determined by Statute law in India. The rule by which that question must be solved, are rules adopted by the Judges in India from the rules of English law and equity, modified on account of the different procedure which prevails here, and in part altered by legislation. In the Common Law Courts in England, before the Judicature Acts, it was necessary for all persons jointly interested at law to join in suing as plaintiffs. The same rule prevails generally in equity ; but, when there was a substantial ground for not making some of such persons plaintiffs, it has been held sufficient if they were made defendants—Daniell's Chancery Practice (6th Ed.), Vol. I, page 216 ; *Luke vs. South Kensington Hotel Company*.⁽³⁾ These rules, though not of statutory obligation, were deemed essential to the due administration of justice, in order that the same defendant might not be more than once molested in respect of the same cause of action, to give the debtors a valid discharge, and to prevent multiplicity of suits. According to the old English practice, however, not only was it requisite to make all proper persons plaintiffs, but at law the misjoinder of plaintiffs was fatal to the action, and the rules as to who could join in suing were strict and narrow. It was often difficult to select the proper plaintiffs, and mistakes frequently occurred on account of the stringency of the law. To remedy this inconvenience, and to give a latitude, which was considered advisable in this branch of

(1) I. L. R. 9 All. 486.

(2) I. L. R. 18 Calc. 63.

(3) L. R. 11 Ch. D. 121.

the law of procedure, the rules framed under the Judicature Acts provided that all persons might be joined as plaintiffs in whom the right of any relief claimed was alleged to exist, whether jointly, severally, or in the alternative. (Order XVI., R. 11.) After the passing of this rule a misjoinder of plaintiffs, except in the matter of costs, became an immaterial error. The rules and practice as to the necessity of joining as parties to the suit all persons jointly interested in the cause of action, have been adopted by all the Indian High Courts — *Kalidás Kevaldás vs. Nathu Bhugvan*,⁽¹⁾ *Dular Chund vs. Balram Das*,⁽²⁾ *Ramsebuk vs. Ramlall Koondoo*,⁽³⁾ *Arunachala vs. Vythialinga*.⁽⁴⁾ The case last cited is an authority for saying that the rule adopted in the Court of Chancery rather than that followed by the Courts of Common Law is the one followed in India.

The Indian Legislature has introduced the provision as to the persons who can sue as plaintiffs in a joint and in a common cause of action from the rules framed under the Judicature Act, to which we have adverted. It is now enacted as section 26 of the Civil Procedure Code. This is a permissive section, enacted for the reason and with the object already referred to. The general law as to the necessity of joining as parties to the suit all persons who have a joint or common interest in the cause of action, and as to the consequences of a misjoinder of plaintiffs, may be said to be now practically identical under English law and under the practice of the Indian Courts.

Turning to the more particular question with which we have to deal in this reference, the law applicable to joint contractors, we find that, at common law, on the death of one of them, the benefit of the joint contract devolved upon the survivors. "In the same manner it is of debts and duties &c., for if an obligation be made to many for one debt, he, which surviveth, shall have the whole debt or duties, and so it is of other covenants, contracts, &c." (Coke upon Littleton (Ed. 1832), Vol. II, sec. 282, page 182A.) An exception was made in case of partners in trade. The comment of Lord Coke upon the above passage from

1892.

MOTILAL
BECHARDÁS
vs.
GHELLABHAI
HARIRAM.

(1) I. L. R. 7 Bom. 217.

(2) I. L. R. 1 All. 453.

(3) I. L. R. 6 Cal. 815.

(4) I. L. R. 6 Mad. 27.

1892.

MOTILAL
BECHARDAS
vs.
GHELLABHAI
HARIRAM.

Littleton is this: "Here by force of the Act an exception is to be made of two joint merchants, for the wares, merchandise, debts, or duties that they have as joint merchants or partners shall not survive, but shall go to the executors of him that deceaseth: and this is *per legem mercatoriam*, which (as hath been said) is part of the laws of this realm for the advancement and continuance of commerce and trade, which is *pro bono publico*, for the rule is that *Jus accrescendi inter mercatores pro beneficio commercii locum non habet*. And to the latter &c. in this section the like exceptions must be made." Mr. Justice Williams says: "The general rule is that the interest which the testator had in a chose in action jointly with another shall not pass to his executor, yet *per legem mercatoriam* as formerly mentioned an exception was established in favour of merchants which has been extended to all traders and persons engaged in joint undertakings in the nature of trade:" Williams on Executors (8th Ed.), page 850. This is relied upon as a true exposition of the law by Mellish, L.J., in *McClean vs. Kennard*.⁽¹⁾ The whole subject is elaborately considered in *Buckley vs. Barber*.⁽²⁾ It is clear upon these authorities that in the case of trading partnerships the benefit of a deceased partner in a joint contract survived to his executors, both at law and in equity, under the English system. That portion of the English law was incorporated into the law administered in India long before the Indian Contract Act.

The obligations of joint debtors under a joint contract were governed by similar principles. All, if living, were liable to the creditor for the due performance of the contract, but this liability did not devolve, either at law or in equity, upon the representatives of one of them dying in the lifetime of the others; *Richardson vs. Horton*,⁽³⁾ *Other vs. Iveson*.⁽⁴⁾ Partners stood upon a different footing. The estate of a deceased partner was liable in equity, in respect of a joint contract of the firm. As to how that equity arose see the judgment of Cairns, L.C., in *Kendal vs. Hamilton*.⁽⁵⁾ This equity was also given effect to in Courts in India before the Contract Act. In this High Court it was the common practice to sue the surviving partners and the representatives of a deceased partner for debts due by the firm.

(1) L. R. 9 Ch. 336 at page 346.

(2) 6 Ex. 178.

(3) 6 Beav. 185.

(4) 3 Drew. 177.

(5) L. R. 4 A. C. 504 at page 516.

The Indian Contract Act was avowedly based upon the English law. In the case of joint contracts it made a radical change. Section 45, dealing with the right under a joint contract, provides that (unless a contrary intention appears from the contract) "when a person has made a joint contract with two or more persons jointly, the right to claim performance rests as between him and them, with them during their joint lives, and, after the death of any of them, with the representatives of such deceased person jointly with the survivor or survivors." This enactment places all joint contractors, where a contrary intention is not expressed, upon the same footing as partners jointly contracting (as we have shown) formerly stood. The maxim in India now should be *Jus accrescendi inter contractores locum non habet nisi aliter in contractu expressum*.

A somewhat analogous change was made by section 42 in the obligation which joint contractors lay under to fulfil a joint contract. The obligation is extended to the representatives of a deceased contractor, thus again assimilating the law to that which prevailed in the case of partners jointly contracting. The provision of section 43, which gives the right to the creditor to compel any one of the joint contractors, or the representatives of a deceased contractor, to perform the contract, seems new both in the case of ordinary joint contractors, and in that of partners jointly contracting; as far as the liability under a contract is concerned, it appears to make all joint contracts joint and several.

We cannot doubt but that these sections, which we have referred to, relate to partners as well as to other co-contractors. It has been so decided in *Lukmidis Khimji vs. Purshotam Haridis*,⁽¹⁾ and we think rightly. If the Legislature had intended to except partners from the provisions of these sections, it would have done so in express words. There is no reason for thinking that the general rules laid down in chapter 4 of the Contract Act are not applicable to partners as well as to other contracting parties. The sections under consideration seem, to the contrary, to be intended to assimilate the law relating to joint contracts generally to that which has always been applied to partners contracting jointly.

The Contract Act is not, however, an Act of Procedure. It

1892.

MOTILAL
BECHARDÁS
vs.
GHELLABHAI
HARIRAM.

(1) I. L. R., 6 Bom., 700.

1892.

MOTILAL
BECHARDÁS
vs.
GHELLABHAI
HARIRAM.

defines and declares rights and obligations arising out of contracts and obligations *quasi ex contractu*. The rules as to the procedure for enforcing these rights, the remedy in cases of breach of them, must be sought elsewhere.

In the case of contracts, as in other divisions of the law relating to actions, the parties to sue and to be sued were by English law usually those in whom the right to enforce and the liability under a contract "rested," to use an expression borrowed from the Contract Act. These rules governing the proper choice of plaintiffs and defendants in the case of joint contracts will be found concisely stated by Mr. Dicey in his work on Parties to Actions (R. 16, 48, 52, 55, and 58). Speaking broadly, the representatives of deceased joint contractors were not proper parties as plaintiffs or defendants in an action upon a joint contract, but all living parties to the contract were necessary parties. The reason of these rules founded on substantive law relating to joint contracts excluding the representatives of deceased contractors from the benefit and burden of joint contracts has ceased to exist in India since the Contract Act was passed. Logically, the rules should also cease to be operative; *ratione cessante lex ipsa cessat*.

The practice relating to the remedy in favour of and against partners was, in English law, anomalous. Although amongst them there was no *jus accrescendi*, and the interest of a deceased partner in the joint property, including the contracts of the firm, devolved upon his executors, the latter could not join the surviving partners in an action upon a joint partnership contract: Dicey, R. 21 and 24; Lindley on Partnership (5th Ed.), page 284. This is stated by Mr. Justice Williams in the passage I have quoted above. It continues thus: "But in these cases, although the right of the deceased partner devolved on his executor, it is now fully settled that the remedy survives to his companion, who also must enforce the right by action, and will be liable on recovery to account to the executors or administrators for the share of the deceased." Williams on Executors (8th Ed.), page 850.

A more logical view was taken in one old case. A surviving partner sued for a debt due to the partnership. The defendant demurred on the ground that the executor of the deceased partner was a necessary co-plaintiff. The demurrer was allowed: *Hall vs.*

Huffam⁽¹⁾. That case was, however, overruled, and the law before the Judicature Acts was well established, that the right to sue for a debt owing to the firm devolved, in the event of the death of one partner, upon the surviving partners exclusively : *Lindley on Partnership* (5th Ed.), page 341.

The same anomalous practice prevailed in Courts of Equity. When the surviving partners in a firm sued for an account or other legal claims, it was not, except under special circumstances, necessary to make the personal representatives of a deceased partner parties to the suit : *Haig vs. Gray*;⁽²⁾ *Daniell's Chancery Practice* (6th Ed.), Vol. I., page 219. The Judicature Acts and Rules have made no changes in procedure when a surviving partner sues : *Bullen and Leake's Pleadings* (4th Ed.), Vol. I., page 294. The same practice prevailed in Indian Courts, in the Bombay High Court, and in the late Supreme Court at Bombay, at all events before the Indian Contract Act,

Since the passing of that Act the practice in the High Court of Calcutta has been changed : *Ram Narain vs Ramchunder*,⁽³⁾ but not in the Allahabad High Court : *Gobind Prasad vs. Chandar Sekhar*.⁽⁴⁾ Logical consistency has there yielded to long-established practice based upon considerations of practical convenience. The inconvenience often resulting in a denial or justice of altering the procedure is pointed out by Edge, C.J., in his judgment in the above cited case of *Gobind Prasad vs. Chandar Sekhar*.⁽⁵⁾

In the judgment of the Third Judge of the Small Cause Court in a case sent up with this reference, it is stated that the practice of the Small Cause Court in Bombay has hitherto been not to join the heirs of a deceased co-partner with the surviving partners when suing for a partnership debt. The question has not been, so far as we know, the subject of judicial decision in this High Court, though we believe that since the *dictum* of the Court in *Lukhmidás Khimji vs. Purshotam Haridás*,⁽⁶⁾ it has been more usual to add the heirs of a deceased partner as parties plaintiffs *ex majori cautelâ*. This was a mere form until the passing of the recent Act making it neces-

1892.

MOTILAL
BECHARDÁS
vs.
GHELLABHAI
HABIRAM.

(1) 2 Lev. pp. 188 & 228.

(2) 3 DeG. & Sm. 741.

(3) I. L. R. 18 Calc. 86.

(4) I. L. R. 9 All. 486.

(5) I. L. R. 9 All. 486.

(6) I. L. R. 6 Bom. 700.

1892.

MOTILAL
BECHARDÁS
vs.
GHELLABHAI
HARIRAM.

sary for such heirs to obtain probate or letters of administration before a judgment can be passed in their favour. It has now become a matter of vital importance.

To the observations of Edge, C.J., may be added the remark that frequently the representative of a deceased partner has no interest whatever in the property of the firm, such interest being often represented by a *minus* quantity. Section 263 of the Contract Act (IX. of 1872) preserves to surviving partners the right of giving valid discharges to debtors of the firm which they possessed under English Law: *Bulchart vs. Dresser*; ⁽¹⁾ *Braiser vs. Hudson*; ⁽²⁾ *Lindley on Partnership* (5th Ed.), page 342. There is no reason on that ground for holding that the surviving partners are not competent to sue.

The introduction into section 45 of the words "as between him and them" occasions no doubt a serious difficulty in adopting the ruling of the High Court of Allahabad. It is difficult to give these words their full effect if the surviving contractors in the case of partners are allowed to sue alone. The right to performance of the contract, as far as the other contracting party is concerned, rests just as much with the representative of the deceased partner as with the surviving partner. Can the latter, then, sue without joining the former as a party to the suit? Logical consistency points to an answer in the negative. The case of partners is, however, as we have shown, anomalous, and we think that as the Legislature has not enacted that the representatives of a deceased partner must join in suing on a partnership contract jointly with the surviving partners, we are not wrong in holding that, notwithstanding the provisions of the Contract Act, the old practice of the Small Cause Court need not be changed.

The decision of this Court in *Raghavendra Madhav vs. Bhima*, ⁽³⁾ involves an answer in the affirmative to the second question.

Attorney for plaintiffs—*T. A. Bland*.

(1) 4 DeG. M. & G. 542.

(2) 9 Sim. 1.

(3) I. L. R. 16 Bom. 349.

FRAMJI MANEKJI PUNJIAJI AND ANOTHER, PLAINTIFFS, versus
THE SECRETARY OF STATE FOR INDIA IN COUNCIL, DEFENDANT.*

1892.
Sept. 2.

*A'bkári (Bombay) Act V. of 1878, section 55—Construction—"Or" read
"nor"—Order of confiscation.*

Section 55 of the Bombay A'bkári Act, V. of 1878, provides that "no order of confiscation shall be made until the expiration of one month from the date of seizing the things intended to be confiscated or without hearing any person who claims a right thereto, and the evidence, if any, which he produces in support of his claim." Certain casks of vinegar belonging to the plaintiffs were seized by the Collector of Bombay on the 5th November 1891, and an order of confiscation was made on the 17th November 1891. The order was made after hearing the plaintiffs.

Held, that under the provisions of the A'bkári Act, section 55, the Collector could not make a valid order of confiscation before the expiration of one month from the date of seizure.

CASE stated for the opinion of the High Court under section 69 of the Presidency Small Cause Courts Act (XV. of 1882) by Hormasji Dadabhai, Fourth Judge.

1. In this case the plaintiffs, who carry on business in Bombay in Indian condiments, sought to recover from the defendant the sum of Rs. 560, being the value of twenty-five casks of toddy vinegar the property of the plaintiffs, imported from Goa on 7th of February 1891. The plaintiffs allege in their statement of claim that the said casks of vinegar were wrongfully and without any justifiable cause detained by the Collector of Customs at Bombay, on their landing on the said 7th February, and then illegally and without proper cause seized by the Collector on the 5th November 1891, and illegally and unjustifiably confiscated on the 17th November 1891.

2. A copy of the summons and a copy of the plaintiffs' bill of particulars are hereto annexed.

3. The defence to the action was justification under the Bombay A'bkári Act (V. of 1878); sections 7, 9, 37, 54, and 67 (1) were particularly relied on in support of this plea.

The following are the sections of Act V. (Bombay) of 1878 referred to :

Punishment of subordinate officers for misconduct.	any time after inquiry recorded in writing, fine, dismiss, suspend, or reduce any subordinate officer appointed, or any officer on whom any additional powers or duties have been conferred or imposed by them under the provisions
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* Reported at I. L. R. 17 Bom. 154.

1892.

FRAMJI
MANEKJI
PUNJIAJI
vs.
THE SECRETARY
OF
STATE FOR
INDIA IN
COUNCIL.

of the last preceding section, for any breach of departmental rules or discipline or of carelessness, unfitness, neglect of duty, or other misconduct.

Section 9.—No liquor or intoxicating drug shall be imported by land or by sea into any part of the Presidency of Bombay unless—

Import of liquor or intoxicating drug.

(a) it is liable to the payment of duty under the Indian Tariff Act, 1875, or any other law for the time being in force relating to the duties of customs on goods imported into British India, and the duty prescribed by such law has been paid thereon, or

(b) such import is permitted under the power next hereinafter conferred.

Subject to the orders of Government the Collector may from time to time—

(c) permit the import of liquor or intoxicating drug or of any kind of liquor or intoxicating drugs other than liquor or intoxicating drugs liable to the payment of duty under such law as aforesaid, on payment of duty, if any, to which the same is liable under this Act and on such other terms as he thinks fit, and

(d) cancel such permission.

Power to seize liquor, &c., in open places and to detain, search, and arrest.

Section 37.—Any Commissioner or Collector or other A'bkári officer duly empowered in this behalf may :

(a) seize in any open place any liquor or intoxicating drugs or any other thing which he has reason to believe to be liable to confiscation under this or any other law for the time being in force relating to A'bkári revenue ;

(b) detain and search any person whom he has reason to believe to be guilty of any offence against this or any other such law, and if such person has any such liquor, drug, or other thing in his possession, arrest him.

Section 54.—All liquor or intoxicating drugs imported, exported, transported, removed, manufactured, sold, or had in possession in contravention of this Act or of any rule or order made under this Act, or of any

What things liable to confiscation.

license, permit, or pass obtained under this Act ; and

All toddy drawn from any tree in contravention of this Act or of any such rule, order, license, permit, or pass as aforesaid ; and

All liquor, if any, and all intoxicating drugs, if any, lawfully imported, exported, transported, removed, manufactured, sold, or had in possession, and all toddy, if any, lawfully drawn along with or in addition to any liquor or intoxicating drugs imported, exported, transported, removed, manufactured, sold, or had in possession or along with or in addition to any toddy drawn as aforesaid ; and

All stills, utensils, implements, or apparatus whatsoever for the manufacture of liquor or of any intoxicating drugs used, kept, or had in possession in contravention of this Act or of any rule or order made under this Act or of any license obtained under this Act ; and

All materials collected or had in possession for the purpose of unlawfully manufacturing liquor or any intoxicating drugs ; and

The vessels, packages, and coverings in which any liquor, intoxicating drug, still, utensil, implement, apparatus or material aforesaid is found and the other contents, if any, of the vessel or package in which the same is found and the animals, carts, vessels, or other conveyances used in carrying the same, shall be liable to confiscation.

Order of confiscation by whom shall be adjusted by the Collector :

Provided that no order of confiscation shall be made until the expiration of one month from the date of seizing the things intended to be confiscated or without hearing any person who claims a right thereto, and the evidence, if any, which he produces in support of his claim.

Whenever confiscation is ordered under this Act, the owner of the thing ordered to be confiscated may, at the discretion of the Collector, be given an option of redeeming it on payment of such fine as the Collector thinks fit.

Section 57.—No action shall lie against Government or against any A'bkári officer for damages in any Civil Court or any act *bonâ fide* done or ordered to be done by them in pursuance of this Act, or of any law at the time in force relating to ábkári revenue.

And all prosecutions of any A'bkári officer and all actions which may be lawfully brought against Government or against any A'bkári officer in respect of anything done, or alleged to have been done in pursuance of this Act, shall be instituted within four months from the date of the act complained of, and not afterwards, and any such action shall be dismissed

(a) if the plaintiff does not prove that previously to bringing such action he has presented all such appeals allowed by this Act, or by any other law for the time being in force, as within the aforesaid period of four months it was possible to present, or

(b) in the case of an action for damages, if tender of sufficient amends shall have been made before the action was brought, or if, after the institution of the action, a sufficient sum of money is paid into Court with costs by or on behalf of the defendant.

Provided that nothing in this section shall be deemed to affect the powers or jurisdiction of Her Majesty's High Court of Judicature or of the Court of Small Causes at Bombay.

4. The seizure and confiscation of the goods on the dates alleged in the particulars of demand were not denied.

(Clauses 5 to 9 of the case stated are not material for the purpose of this report and are therefore omitted.)

1892.

FRAMJI
MANEKJI
PUNJIAJI
vs.
THE SECRETARY OF
STATE FOR
INDIA IN
COUNCIL.

1892.

FRAMJI
MANEKJI
PUNJIAJI
vs.
THE SECRETARY OF
STATE FOR
INDIA IN
COUNCIL.

The order of confiscation was made after hearing the plaintiffs.

10. The points for determination were :

(1) Whether this vinegar was liquor within the purview of the Bombay A'bkári Act (V. of 1878) ?

(2) If so, whether it was liable to the payment of duty under the Indian Tariff Act (XVI. of 1875) or any other law for the time being in force relating to Customs duties on goods imported into British India ?

(3) Whether the seizure was properly made on 5th November 1891 ?

(4) Whether the order of confiscation of 17th November 1891 fulfilled the requirements of section 55, and whether it was valid even though made before the expiration of a month from the date of seizure, but after hearing the plaintiffs and receiving such proofs as they wished to adduce ?

(5) If such order was invalid, what damages, if any, were the plaintiffs entitled to under the circumstances of the case ?

11. As to section 67, I was of opinion that the acts complained of were not within its protection. Moreover, the Collector could not be said to have acted *bond fide* in the legal sense of the term.

12. In the view I took of the 55th section it became unnecessary to decide the first, second, and third questions.

13. It runs thus : "All confiscations under this Act shall be made by the Collector, provided that no order of adjudication shall be made by the Collector until the expiration of one month from the date of seizing the things intended to be confiscated, or without hearing any person who claims a right thereto, and the evidence, if any, which he produces in support of his claim." This is a highly penal proceeding, and, to put it very mildly, it makes one of the parties a judge in his own cause. It ought to receive a strict interpretation. It first provides that all confiscations shall be made by the Collector. Then follows a provision, which is expressed in negative terms, and is, therefore, imperative. It says no such order shall be made until the expiration of a month. This is the first limitation to the exercise of the Collector's powers. It peremptorily forbids him to pass the order in any event until the lapse of a month. If he makes one within the prescribed period, it is wholly void and

inoperative, and is a mere nullity. The proviso then goes on to impose another condition, another restriction to the exercise of his power in respect of a wholly different matter, namely, he is not to make the order without hearing the claimant or objector. It has been maintained for the defence that the proviso authorizes the Collector to adjudge confiscation upon the happening of one of the two contingencies either after a month or after hearing the claimants. If this argument be sound, the Collector would not be bound to grant a hearing. He may positively refuse to hear, wait for a month, and then confiscate the goods. If the two clauses are to be read in the alternative that would be the necessary consequence. He has the option of doing one of the two matters, and he does one, no matter why, in preference to the other. This construction would be revolting to the legal mind. Mr. Little felt the force of the objection and sought to destroy it by suggesting a transposition of the two clauses which he thought would make the "hearing" compulsory. In the first place, such a transposition is inadmissible in a fiscal statute, but secondly, it does not really help to solve the difficulty. "Provided that no order of adjudication shall be made without hearing any person who claims a right to the things seized, or until the expiration of a month after seizure." This leaves the Collector's option untouched. He may still elect to postpone taking action for a month instead of hearing the party grieved. If the clause relating to "hearing" acquires an obligatory force by reason of its holding the first place in the sentence, why should not the clause applicable to the month make it equally incumbent on the Collector to stay his hand until the expiration of a month? It already stands first.

14. The construction placed by the Court upon the section and its proviso receives strong support from the following consideration: It avoids the consequence of a precipitate decision by leaving the Collector freedom for a whole month to alter his mind or modify his views. At the same time the party feeling himself aggrieved has a whole month within which to produce his evidence. The draftsman was no pedant. Having enjoined a prohibition as to time, he did not pause to consider whether the use of the conjunction "nor" instead of "or" in the sentence would not better satisfy all grammatical proprieties. For these reasons the Court disallowed the plea of justification.

1892.

FRAMJI
MANEKJI
PUNJIAJI
VS.
THE SECRETARY OF
STATE FOR
INDIA IN
COUNCIL.

1892.

FRAMJI
MANEKJI
PUNJIAJI
vs.
THE SECRETARY OF
STATE FOR
INDIA IN
COUNCIL.

15. The remaining question relates to the amount of damages. For this purpose the whole circumstances of the case must be looked to from 7th February. There were repeated demands. The plaintiffs were deprived of the possession and use of their goods. The Collector persistently, and in spite of the plaintiff's remonstrances, refused to deliver up the goods. The detention, after the Collector had opportunities of satisfying himself as to the quality of the goods for the purposes aforesaid, was unauthorized. I therefore awarded the value of the goods before they got deteriorated in the manner and owing to the causes stated in this reference.

There was a decree in plaintiff's favour for Rs. 307 and costs, contingent upon the opinion of the High Court.

16. At the close of the case I was required by Mr. Little to state a case for the opinion of the High Court, which I have now the honour to solicit upon the questions :

(1) Whether, under the provisions of section 55 of the Bombay A'bkari Act of 1878, the Collector can make a valid order of confiscation before the expiration of one month from the date of seizing the things intended to be confiscated, but after hearing the person who claims a right to them ?

(2) Whether the plaintiffs were entitled to the damages, awarded in the face of their admission that the goods were valueless at the time of seizure and confiscation in November ?

Anderson for plaintiffs.

Lang (Acting Advocate General) for defendant.

BAYLEY, C.J. :—In this case I am of opinion that the learned Small Cause Court Judge's view of the proper construction to be given to section 55 of Act V. of 1878 is correct. The provisions of this Act, it is to be remarked, are intended to be in protection of the subject. It is also to be borne in mind that they are of a highly penal nature. The Court, therefore, will be very averse to anything like a strained construction of this section, if that construction is one which tends to cut down the protection intended to be given to the public. Now this section runs thus :

“ All confiscations under this Act shall be adjudged by the Collector, provided that no order of confiscation shall be made until the expiration of one month from the date of seizing the things intended to be confiscated, or without hearing

any person who claims a right thereto, and the evidence, if any, which he produces in support of his claim.

"Whenever a confiscation is ordered under this Act, the owner of the thing ordered to be confiscated may, at the discretion of the Collector, be given an option of redeeming it on payment of such fine as the Collector thinks fit."

To my mind that language is sufficiently plain and intelligible. It may be that it would be more strictly grammatical to have used "nor" instead of "or" in this sentence. But the meaning of the section, I think, is clear. It is that both these conditions must be fulfilled before an order of confiscation can be made. And that this was the deliberate intention of the Legislature I can very well believe. A month does not seem too long a period to provide before such a serious step as an order of confiscation is allowed to be taken. It is highly desirable that such an order as that should not be made in a hurry.

The construction contended for by the Advocate General is, I think, a very laboured construction entailing a distinct straining of the language of the section, which, as I have already said, seems to be plain and intelligible enough as it stands. Why should the Court so strain the language of the section? I think no reason, certainly no sufficient reason has been shown as to taking that course, if we are at liberty to take it.

On these grounds I think the answer to the first question referred to us by the learned Fourth Judge of the Small Cause Court should be in the negative.

FARRAN, J.:—I am quite of the same opinion. Now the first provision of this section 55 is this: "No order of confiscation shall be made until the expiration of one month from the date of seizing the things intended to be confiscated." That is in the broadest and the most imperative terms. It is a provision dealing with the condition of time. The second provision, namely, "or without hearing any person who claims a right thereto" &c. has nothing to do with the question of time. In such a section as this is, a section dealing with the conditions to be observed before making the order of confiscation, one would expect both these matters to be provided for, both a provision as to the time that must be allowed to elapse before such an order is made and also a provision as to the claimant's right to be heard. Presumably, therefore, the second provision is in addition to, and not in substitution for, the first provision. Is there anything in

1892.

FRAMJI
MANEKJI
PUNJIAJI
vs.
THE SECRETARY OF
STATE FOR
INDIA IN
COUNCIL.

1892.
 FRAMJI
 MANEKJI
 PUNJIAJI
 vs.
 THE SECRETARY OF
 STATE FOR
 INDIA IN
 COUNCIL.

the language used which overrides this presumption? On the contrary, it is only by reading this section, as perhaps a purist might read it, that room is left for any other construction. Using language as it is commonly used, the word "or" in a sentence constructed as this is, would as often be used as the word "nor," to which here, I think, it is clearly equivalent. The illustration put during the argument gives an example of such a case. One may say to a child, "You are not to leave the house for an hour, or without your great-coat." Can there be a shadow of doubt as to what is there meant? This property of the word "or" in a sentence thus formed seems to be a peculiarity of the language, as is well shown by Grove, J., in *The Metropolitan Board of Works vs. Steed*.⁽¹⁾ In a sentence beginning with a negative, as this does, "or" is understood as repeating, or carrying, on that negative, *i.e.* as equivalent to "nor".

Certainly had the intention of the Legislature been otherwise, you would have expected to have found the plain and imperative provision that "no order should be made within one month" cut down or qualified by words equally plain and unmistakeable, and that we should not have been left to extract that intention by such a laboured and difficult process of argument as with the words as they now stand is required.

1892.
 Dec. 9.

GOVINDJI MOHANJI, PLAINTIFF, versus MANEKCHAND NAGSI,
 DEFENDANT.*

Evidence—Recitals in deeds not sufficient proof in themselves of facts recited.

Recitals in deeds of mortgage by a Hindu widow, having a widow's estate in the property of her deceased husband, are not in themselves sufficient evidence for the Court to hold that loans raised by the deceased were for family purposes, and so binding on his heirs.

CASE stated for the opinion of the High Court under section 69 of the Presidency Small Court Act (XV. of 1882) by C. W. Chitty, Chief Judge.

1. This was a suit by the plaintiff to recover from the defendant a sum of Rs. 2,000, part of a larger sum of Rs. 2,156, alleged to be due to the plaintiff under the following circumstances.

(1) L. R. 8 Q. B. D. 445 at page 447.

2. On the 27th December 1891 by a Guzaráti agreement the defendant agreed to sell to the plaintiff a piece of land situate at Sat Tar, or Dongri Koli Street, described in the agreement as of Pension and Tax Tenure, with a house standing thereon, for the price of Rs. 24,500, and by the same agreement the defendant agreed to give a marketable good title in respect of the property sold. The purchase was to be completed within two months.

3. The plaintiff paid a sum of Rs. 1,500 as deposit, and it was admitted that he has since had to pay Rs. 490 as his share of the brokerage, and a further sum of Rs. 166 as costs of investigating the title, amounting in all to Rs. 2,156.

4. After the agreement the plaintiff, through his solicitors, proceeded to investigate the title to the said property, when the following facts (as to which there is no dispute) were elicited:—The property in question had belonged to one Poshia Bhikia Koli absolutely. He died in or before the year 1885, apparently intestate, and leaving two widows, Lakshmibái and Dhanibái, and a daughter, who is still an infant. In the year 1885, Lakshmibái got the land transferred into her own name in the Collector's books. On the 12th May 1886, Lakshmibái mortgaged the property to one Kamblia Antone to secure a loan of Rs. 800, said to be required for the purpose of paying and satisfying the debt incurred by Poshia Bhikia, and also for the purpose of the domestic expenses &c. On the 27th June 1888, the debt due to Kamblia Antone was paid off, and he reconveyed the property to Lakshmibái. Lakshmibái had further mortgaged the same property, to secure a loan from a Marwári, Manrup Kusha, by a Maráthi deed, which is not in evidence. On the 3rd December 1886, the Marwári reconveyed the property to both the widows. On that day the widows again mortgaged the property to Joshi Hansraj Jivraj to secure the sum of Rs. 3,000, to enable them to pay off the debts of their deceased husband, incurred by him during his lifetime in rebuilding the hereditaments and premises intended to be thereby granted and assured, and his other property, and some other purposes of his own. On the 27th June 1888, the widows executed a further mortgage with possession to Joshi Hansraj Jivraj to secure a further sum of Rs. 2,000 required by them. On the 8th January 1889 the debt of about Rs. 6,000 due to Joshi Hansraj Jivraj was paid off, and the property reconveyed

1892.

GOVINDJI
MOHANJI
vs.MANEKCHAND
NAGSI.

1892.

GOVINDJI
MOHANJI
vs.
MANEKCHAND
NAGSI.

to the two widows, who on the same day sold the whole property to the defendant for the sum of Rs. 7,500. Although the widows are described in the several deeds as absolutely entitled to the property, it was admitted that they had only a widow's estate in it, according to Hindu law, and that in fact the daughter of Poshia Bhikia would, if she survived them, become entitled to the property.

5. On the 4th March 1892 the plaintiff wrote to the defendant complaining of the two defects in the title, (1) that the land though described as of Pension and Tax tenure, was actually held on a quit and ground rent tenure; and (2) that, as there was a daughter of Poshia Bhikia still living, the widows had no power to mortgage or sell the property. The plaintiff therefore cancelled the agreement, and asked for a return of his deposit and payment of his costs of investigating the title, and gave notice of his intention to claim from the defendant any brokerage which he might be called upon to pay. On the 17th March the defendant replied denying the plaintiff's claim, and stating that the title deeds showed that the sale and previous mortgages of the property were necessitated for family purposes, and to pay debts, and that the daughter was bound by such sale. The plaintiff again repeated his demand, giving the defendant eight days in which to clear the title. As nothing further was done by the defendant, the plaintiff considered the agreement as cancelled and filed his suit.

6. As to the first objection, that the tenure of the land had been wrongly described, it was agreed that it might be a matter of compensation, to be paid to the purchaser, and the point was therefore not argued before me.

7. As to the second objection, it was contended on behalf of the defendant that the mortgages and sale were for family purposes, and therefore binding on the daughter, and that this fact was proved by the recitals in the various deeds. Even assuming that the mortgages and sale were for family purposes, I was of opinion that recitals, without more, would not form sufficient proof of such a fact, either on the plaintiff's requisitions or in this Court. But in this case I was further of opinion that the recitals (all of which so far as they relate to the point in question are set out above) did not purport to state that the whole debt was for family purposes. Moreover, the deed of mortgage in favour of the Marwari Manrup

Kusha was not produced, and there was nothing to show for what purposes that debt was incurred. Then again the widows sold the whole property, which was apparently not necessary, having regard to the amount of debts then due by them.

8. It was then suggested by the defendant's pleader that he should be allowed to call evidence to show that the debts were for family purposes, and that the title was therefore good. This, however, I declined to do for the reasons given in my judgment.

9. I accordingly passed a decree in favour of the plaintiff for Rs. 2,000, and costs, and professional costs Rs. 51, subject to the opinion of their Lordships on the following questions :

(1) Whether the recitals in the deeds are in themselves sufficient evidence for the Court to hold that the loans were for family purposes, and so binding on the daughter of Poshia Bhikia ?

(2) Whether the evidence proposed to be given by the defendant of the loans having been made for family purposes was rightly rejected ?

10. This case has been stated at the request of the defendant, who has deposited in Court the amount of the decree, with Rs. 50 to meet the costs of reference.

JUDGMENT OF THE HIGH COURT—(Sargent, C.J., and Bayley, J.)

We answer the first question in the negative and the second in the affirmative. Costs of reference to be costs in the cause, and to be taxed by the Taxing Officer, High Court, as on the Original Side.

F. Y. SMITH AND OTHERS, APPELLANTS, versus THE MUNICIPAL COMMISSIONER FOR THE CITY OF BOMBAY, RESPONDENT.*

City of Bombay Municipal Act (III. of 1888), sections 142, 156, 157, 248—“Premises,” meaning of the word in section 142—Haldikhor tax, on what premises to be levied—Section 142 (3), construction of—

The word “premises,” in the City of Bombay Municipal Act (III. of 1888), section 142 (1), refers to “the buildings and lands in the city,” on which by section 140 the property taxes generally are to be levied, and must mean a single building, or piece of land, or several buildings, or pieces of land, constituting in the aggregate a distinct property; but a property tax cannot be levied on any buildings or lands

1892.

GOVINDJI
MOHANJI
vs.
MANEKCHAND
NAGSI.

1892.

Dec. 20.

1892.

F. Y. SMITH
 vs.
 THE
 MUNICIPAL
 COMMISSIONER.

which are not entered in some Ward Assessment book under some distinguishing name or number.

The object of section 142 (3) of the said Act is to secure the municipal revenue against the loss of halálkhor tax which would be otherwise incurred when the Municipal Commissioner in the exercise of the discretion given him by section 248 (2) might think it unnecessary to require the owner of two or more premises to construct separate privies, water-closets, or urinals. Clauses (1) and (2) of section 248 must be read together, and so read shew that if the Municipal Commissioner does not excuse the owner or owners of such premises as are contemplated by clause (2), he must give the notice contemplated by clause (1). In other words, "but" for his giving the direction as contemplated by clause (2), a privy, water-closet, or urinal would have to be constructed on the premises. Section 142 (3) must therefore be construed as making the premises liable to the tax, if they would be so liable in the state in which it is to be presumed they would be, if the direction had not been given by the Municipal Commissioner, viz., if a separate privy, water-closet, or urinal had been constructed on the premises.

CASE stated for the opinion of the High Court under section 2 (1) of Act XII. of 1888, by C. W. Chitty, Chief Judge.

1. This is an appeal under section 217 of the City of Bombay Municipal Act, 1888, against the halálkhor tax and water tax levied by the respondent on premises belonging to the appellants. The appeal, so far as it relates to the water tax, has been dismissed by me, and it is with regard to the halálkhor tax only that any question now arises.

2. A copy of the petition of appeal with the schedule of properties thereto annexed is sent herewith and marked A.

3. The appellants are the executors of the will of the late Sir Mungaldas Nathubhai, and as such are entitled to certain properties situate in and near Shaik Memon Street and known as the Cloth Market and the Cutlery Bazár respectively.

4. The property known as the Cloth Market is situate on land lying between Kitchen Garden Lane, Shaik Memon Street, and New Hanumán Lane, and comprises several ward numbers. On the land are buildings consisting for the most part, and, so far as they are comprised in this appeal, entirely, of shops and godowns let out to tenants. On the west side of the cloth market property between ward Nos. 1200 and 1299 are situated four urinals. Further on the west side in ward No. 1298 is a bathing-place, and in the north-west corner of the property adjacent to ward No. 1302 are four privies. The urinals and bathing-place are respectively connected by a

drain with a municipal drain. It was proved at the hearing that the urinals, bathing-place, and privies were used by all persons in the market, whether tenants, merchants, or customers, and I have no doubt from the evidence of Rustomji, the sub-manager of the appellants, that they were in fact constructed for such purpose. They are in fact the only urinal and privies available for the market people. The respondent has by ten notices under section 248 (2) directed that a separate water-closet, privy, or urinal need not be required for each of the said premises.

5. The urinals and privies are apparently not included in any ward number, but are situated in the open spaces between the premises. It was not disputed that, except these urinals, bathing-place, and privies, there were no other privies, urinals, or cesspools in the various premises in the cloth market, the subject of this appeal, and consequently no accumulation or deposit of excrementitious or polluted matter.

6. The case of the Cutlery Bazar is somewhat similar. That property is situate at the corner of Shaik Memon Street and Janjekar Street and consists of a number of shops in blocks divided by passages. It comprises three ward numbers. In this case there are four urinals situate in ward No. 526, which were built for and are used by all the people frequenting the market whether tenants, merchants, or customers. The urinals are connected by a drain with a municipal drain. The respondent has given notice for the erection of a privy in one portion of this market and has given a notice under section 248 (2) in respect of another portion.

7. On behalf of the appellants it was urged in the first place that the word "premises," as used in section 142, could only mean such premises as were comprised in and assessed under separate ward numbers, and that it could not bear the interpretation sought to be put upon it by the respondent of the whole premises comprised in the cloth market. Secondly, it was argued that in respect of such of the premises in which there was no privy, urinal, or cesspool, and consequently no accumulation or deposit of excrementitious or polluted matter, the appellants were not liable to pay halalkhor tax, and that the direction of the Commissioner under section 248 (2) could not make them so liable. In support of this contention the appellants relied on the ruling of the High Court in Municipal Appeal

1892.

F. Y. SMITH
vs.
THE
MUNICIPAL
COMMISSIONER.

1892.

F. Y. SMITH
vs.
THE
MUNICIPAL
COMMISSIONER.

No. 7 of 1890: *Goverdhundás Goculdás Tejpal vs. The Municipal Commissioner of Bombay*,⁽¹⁾ and on the wording of section 142 (3).

8. For the respondent it was contended that the word "premises" must, in the case of the cloth market and cutlery bazár, mean the whole Cloth Market and Cutlery Bazár respectively, inasmuch as each formed a distinct property situate within certain bounds and belonging to the same owner. The respondent's answer to the second part of the case was that these properties, but for the direction of the respondent under section 248 (2), would be chargeable under section 248 (1), and that that was what was meant by the concluding words of section 142 (3).

9. This is in fact a concrete instance of the hypothetical case alluded to by their Lordships in the judgment on review in the appeal above mentioned, dated the 1st May 1891.

10. At the request of the appellant's attorney, I have stated this case for the decision of their Lordships on the following questions:

(1) Whether the word "premises" in section 142 (1) must not be confined to such premises as are assessed under a separate ward number?

(2) Whether if notices under section 248 (2) had not been issued, halálkhor tax would be leviable in respect of the premises to which they relate?

11. As I am required by the Act to state my opinion on the points submitted, I may say that as to the first question I think that the word "premises" must be taken to mean such premises as are separately assessed under separate ward numbers. This view is borne out, I think, by the wording of section 248. The second question appears to me one of considerable difficulty. There can be little doubt that the intention of the Legislature was to make premises on which no water-closet, privy, or urinal is situate, nevertheless liable to halálkhor tax, where the occupiers of such premises use water-closets, privies, or urinals situate elsewhere, such water-closets, privies, or urinals being, in the opinion of the Commissioner, sufficient for all the premises. Section 142 (3), however, distinctly imposes a condition on such liability "if but for such direction the same would be leviable in respect thereof." This must, I think, mean that the liabil-

(1) *Post*, page 363.

ity will only fall on such premises in respect of which, without the direction of the Commissioner under section 248 (2), the halálkhor tax would be leviable. It appears that this construction will have the effect of rendering section 142 (3) practically nugatory. At the same time I do not see how any other meaning can be placed on the concluding words of section 142 (3), the language of which seems clear. I do not think that the answer of the respondent to this contention can prevail, namely, that if no direction of the Commissioner be given under section 248 (2), then the provisions of section 248 (1) apply and the tax is thereby leviable in respect of the premises. There is nothing in section 248 (1) to render the premises liable to tax, though, if the notice thereby required is given, and the requisite accommodation provided, the premises would doubtless become liable to tax under section 142 (1) (3). It seems then that, giving effect to the concluding words of section 142 (3), and having regard to the ruling of the High Court above referred to, the second question should be answered in the negative and in favour of the appellants.

JUDGMENT OF THE HIGH COURT—(Sir C. Sargent, C.J.,
and Bayley, J.)

The first question turns upon the meaning of the word "premises" in section 142, clause (1). It obviously refers to the "buildings and lands in the city," on which by section 140 the property taxes generally are to be levied, and construed according to its ordinary acceptation, must mean a single building, or piece of land, or several buildings, or pieces of land, constituting in the aggregate a distinct property. The object of the clause is exclusively to lay down the special conditions and circumstances under which "premises," *i.e.* "the lands and buildings in the city," are to be subjected to the imposition of the halálkhor tax, and the term "premises" is used without any reference or relation to the subsequent sections 156 and 157, which require the buildings and lands in the city to be distinguished and entered on the assessment books under separate ward numbers. The first question, therefore, as it has been framed, can only be answered in the negative, but it is probable that what was intended to be referred for the decision of this Court was whether the halálkhor tax can be levied on premises which, although satisfying the condition laid down in clause (1), are not entered in the

1892.

F. Y. SMITH
vs.
THE
MUNICIPAL
COMMISSIONER.

1892.

V. Y. SMITH
VS.
THE
MUNICIPAL
COMMIS-
SIONER.

assessment book under a certain ward number. It is to be remarked that sections 156 and 157 provide for all buildings and lands being distinguished by name or number as the Municipal Commissioner thinks fit, and entered in some ward assessment book. The actual practice of distinguishing them by ward numbers, which has been adopted by the Municipal Commissioner, is therefore not obligatory on him. However, we think that the language of the sections of the Act from 156 to 168 makes it clear that a property tax cannot be levied on any buildings or lands which are not entered in some ward assessment book under some distinguishing name or number. This is shown more particularly by section 166, which provides that the entries in the assessment book are to be accepted as conclusive evidence of the amount of each property tax leviable on each building or land in the ward for the official year to which the book relates. This conclusion is equally applicable to the "holdings, flats, or floors," when treated by the Municipal Commissioner, with consent of the owner, as distinct properties under section 159. The first question must therefore be answered in accordance with the above remarks. The second question referred to the Court turns upon the construction of clause (3) of section 142, which provides that the halálkhor tax shall nevertheless be levied in respect of the premises if but for a direction given by the Municipal Commissioner under clause 2 of section 248 that a separate water-closet, privy, or urinal was not required, the tax would be leviable on the premises. It is to be observed that the object of the three clauses of section 142 is to particularize the classes of premises upon which the halálkhor tax can be levied. The first clause by its sub-clauses (a) and (b) restricts them to premises on which there is a privy, water-closet, or urinal. The second clause, which is a proviso to those sub-clauses, provides for an exemption from the tax in a certain case even when the premises fall under those described in the above sub-clauses. Lastly, the third clause provides for the premises being liable to the tax in a certain case even when there is no privy, water-closet, or urinal on the premises. The object of this clause, it cannot be doubted, was to secure the municipal revenue against the loss of halálkhor tax, which would be otherwise incurred when the Municipal Commissioner, in the exercise of the discretion given him by clause (2) of section 248, might think it unnecessary to require the owner of two or more

premises to construct separate privies, water-closets, or urinals. It is plain, therefore, and this would appear to have been admitted, that the appellant's contention, that the halálkhor tax could not be levied because there is no water-closet, privy, or urinal, actually on the premises as required by sub-clauses (a) and (b), would render the 3rd clause of section 142 entirely nugatory. It is therefore not a construction of the section to be adopted if any other construction which will effect the object of the Act can fairly be placed on the language of the clause. Now it is important to observe that clauses (1) and (2) of section 248 are clearly intended to be read together, and so read they show that if the Municipal Commissioner does not excuse the owner or owners of such premises as are contemplated by clause (2), clause (1) casts on him the duty, without giving him any discretion in the matter, of requiring the said owner or owners to construct a separate privy, water-closet, or urinal on his or their premises. In other words, "but" for the Municipal Commissioner giving the direction as contemplated by clause (2), a privy, water-closet, or urinal would have to be constructed on the premises. Such being the effect of the word "but," the clause in question may, we think, without straining the language, and so as to effect the object which the Legislature must have had in view, be construed as making the premises liable to the tax, if they would be so liable in the state in which it is to be presumed they would be, if the direction had not been given by the Municipal Commissioner, viz., if a separate privy, water-closet, or urinal had been constructed on the premises. The premises in question will therefore be liable to the halálkhor tax if they would fall under either of the sub-clauses (a) and (b) of section 142, supposing the provisions of clause (1) of section 248 had been enforced.

We must therefore answer the second question in accordance with the above remarks, assuming that question to have been intended to obtain the opinion of the Court, whether the halálkhor tax is leviable under clause (3) of section 142.

Costs to be costs in the cause.

1892.

F. Y. SMITH
VS.
THE
MUNICIPAL
COMMISSIONER.

1893.
Jan. 13.

DHARAMJI LALJI, APPELLANT, versus THE MUNICIPAL COMMISSIONER FOR THE CITY OF BOMBAY, RESPONDENT.

City of Bombay Municipal Act (III. of 1888), sections 142, 158, 248—Halálkhor tax, on what premises to be levied—Building consisting of ground and upper floors—Floors treated as separate properties under separate ward numbers chargeable separately.

Where the appellant owned a building, the ground floor of which consisted of shops let out to tenants and the upper floor of which was let out separately for dwelling purposes, and the two floors were separately assessed under different ward numbers,

Held, that the two floors constituted separate premises for the purposes of sections 142 and 248, and there being no privy, water-closet, or urinal on the ground floor as contemplated by section 142, and no notice having been issued in respect thereof under section 248 (2), the halálkhor tax was leviable in respect of the upper floor only.

CASE stated for the decision of the High Court of Judicature at Bombay under section 2 of Act XII. of 1888, by C. W. Chitty, Chief Judge.

1. This is an appeal presented under section 217 of the City of Bombay Municipal Act, 1888, against the charge of halálkhor tax levied by the respondent in respect of certain premises belonging to the appellant.

2. The appellant is the owner of a building situate in Shaik Memon Street, the ground floor of which consists of shops let out to tenants and the upper floor of which is let out separately for dwelling purposes. The ground floor and upper floor are assessed as separate properties under wards Nos. 217 (1) and 217 (2) respectively.

3. On the ground floor (217 (1)) there is no privy, urinal, or cesspool, nor is there any accumulation or deposit of excrementitious or polluted matter, nor has the Commissioner issued any notice under section 248 (2) in respect of this holding. On the upper floor (217 (2)) there is privy accommodation connected by drains with municipal drains.

4. The ground floor has no direct communication with the upper floor, which is approached by steps outside the building.

5. It was contended by the appellant that the ground floor and upper floor were treated as separate properties under section 158, and therefore formed separate premises for the purposes of section

142. For the respondent it was argued that being in one building the two holdings must be regarded as one premises. I am of opinion that the two portions of the building should be treated as separate properties, and that for the purposes of section 142 they form two "premises," and that the appellant is therefore entitled to the exemption which he claims.

6. The amount of the tax in this case is small, Rs. 45-14-5, but the point is an important one, and admits of reasonable doubt. I therefore refer it to their Lordships to say whether or not under the circumstances as stated above the halalkhor tax is properly charged.

JUDGMENT OF THE HIGH COURT (Sir C. Sargent, C.J., and
Bayley, J.)

We are of opinion that as the ground floor and upper floor have been treated as separate properties under section 158, they constitute separate premises for the purposes of sections 142 and 248, and there being no privy or water-closet or urinal on the lower floor as contemplated by clauses (a) and (b) of section 142, and no notice having been issued by the Municipal Commissioner under section 248 (2), the halalkhor tax is at present only leviable in respect of the upper floor.

Costs to be costs in the cause.

GOVERDHUNDA'S GOKULDA'S TEJPAL, PLAINTIFF; versus THE
MUNICIPAL COMMISSIONER, DEFENDANT.*

City of Bombay Municipal Act (III. of 1888), section 158—Tax—Drawback—General conditions prescribed by Standing Committee, limiting right to drawback under section 158 'ultra vires'.

Under section 158 of the Bombay Municipal Act (Bombay Act III. of 1888) the following general conditions were prescribed by the Standing Committee with reference to claims for drawback of the general property tax leviable in Bombay :

(1) Except with the special sanction of the Committee no claim for drawback shall be entertained unless submitted to the Commissioner not less than thirty days before the commencement of the half year to which such claim relates.

(2) Drawback of one-fifth part of the general tax shall be sanctioned by the Commissioner in cases falling within either of the following classes and in no others :

* Reported at I. L. R. 17 Bom. 394.

1893.

DHARAMJI
LALJI
vs.
THE
MUNICIPAL
COMMISSIONER FOR
THE CITY OF
BOMBAY.

1893.

Feb. 3.

1893.

GOVERDHUN-
DAS GOKUL-
DAS TEJPAL
vs.
THE
MUNICIPAL
COMMISSIONER.

(a) Chawls or buildings let out for hire in single rooms either as lodging or godowns for the storage of goods.

(b) Properties which, in the opinion of the Commissioner, are usually or frequently vacant, either wholly or partially.

(3) No sanction for drawback shall extend or apply to any floor on which trade or manufacture is carried on, or any goods are sold.

The Commissioner having refused to sanction a drawback of the tax leviable on certain properties of the plaintiff, on the ground that they did not fall within the terms of the above conditions, the plaintiff filed this suit. It was contended in his behalf that the second and third of the above conditions were bad, and that the Standing Committee could not by so-called general conditions limit or curtail the right given to taxpayers by section 158.

Held, that the conditions prescribed by the Standing Committee were not *ultra vires*, and that the Commissioner was justified in refusing the drawback.

CASE stated for the decision of the High Court under section 2 (1) of Act XII. of 1888, by C. W. Chitty, Chief Judge.

1. This is an appeal against the decision of the Municipal Commissioner refusing to sanction a drawback of one-fifth part of the general tax leviable in respect of certain immoveable properties belonging to the appellant.

2. There is no dispute as to the facts of the case. It is admitted that all the properties named in the petition of appeal consist of buildings which are let out in flats; in two cases the ground floor is occupied by shops; with this exception, all the premises are used as lodgings for tenants, but are not let out entirely in single rooms. The said buildings are let to two or more persons holding in severalty, and the Municipal Commissioner has, for the purpose of assessing such buildings to the property tax, treated the whole of each of such buildings as one property.

3. The Municipal Commissioner refused to sanction a drawback in respect of the said properties on the ground that they did not fall within the term of the general conditions prescribed by the Standing Committee. It should be mentioned that no exception was taken to the first of such general conditions.

4. On behalf of the appellant it was argued that the second and third general conditions were bad; that, inasmuch as it has been held by the High Court that "may" in section 158 is to be read as "shall," section 158 is positive and compulsory, that the Standing Committee cannot by so-called general conditions limit or curtail the right given to taxpayers by section 158, and that the second

and third conditions are inconsistent one with the other. For the respondent it was contended that the drawback was properly refused, that the Act itself limits the right of taxpayers by making the sanction of drawback subject to the general conditions prescribed, and that the general conditions are reasonable, if the Standing Committee have the right to say that the drawback is not to be granted in every case which comes within the terms of section 158.

5. The conditions and circumstances under which drawback was allowed when the former Act was in force were prescribed by the Act itself (see Bombay Municipal Act, 1872, section 76,) and it will be seen that the conditions now prescribed are slightly more favourable to the taxpayer, and there can be little doubt that they are not in themselves unreasonable. I had some doubt whether in this case it was open to this Court to go behind such general conditions duly prescribed by the Standing Committee, but assuming that the Court has that power, two questions arise: (1) Whether the general conditions of the 10th March 1892 limit the rights of taxpayers under section 158, and (2) whether the Standing Committee has power to make such conditions.

6. In expressing my opinion on the above points, I may say, with regard to the first question, that in my opinion it should be answered in the affirmative. There is nothing in section 158 itself, except the words "subject to general conditions" &c., which in any way restrict or limit the right of the taxpayers to the allowance of drawbacks in all cases falling within the terms of the section, whereas the conditions confine the allowance to certain classes of property. As to whether the Standing Committee has power to make such a condition, it would appear, from comparison of the former and present Acts, that the Legislature intended to vest in the Standing Committee the power of restricting such allowances, which power was formerly exercised by the Legislature itself (section 76). It would, however, be expected that, if it were so intended, the word "limitation" or "restriction" would be used with or in place of the word "condition," which applies rather to the method of sanctioning allowances. At the same time I think that the word "general conditions" are wide enough to include limitations or restrictions, and that, therefore, the Standing Committee have the power to make such conditions as those in question. There can be

1893.

GOVERDHUN-
DAS GOKUL-
DAS TRIPAL
vs.
THE
MUNICIPAL
COMMISSIONER.

1893.

GOVERDHUN-
DAS GOKUL-
DAS TEJPAL
vs.
THE
MUNICIPAL
COMMIS-
SIONER.

little doubt that, if the contrary be held, it would have the effect of rendering compulsory the allowance of drawback in many cases where it was never intended, and would be unreasonable.

Section 158 of the City of Bombay Municipal Act (III. of 1888) is as follows :

(1) When any building or land is let to two or more persons in severalty, the Commissioner may, for the purpose of assessing such building or land to the property taxes, either treat the whole thereof as one property, or with the written consent of the owner of such building or land, treat each several holding therein, or any two or more of such several holdings together, or each floor or flat, as a separate property.

(2) When the Commissioner has determined to treat all the several holdings comprised within any one building or land under this section as one property, he may, subject to any general conditions, which may from time to time be prescribed by the Standing Committee in this behalf, at any time not later than seven days before the first day of any half year, for which an instalment of general tax will be leviable in respect of the said property, sanction a drawback of the one-fifth part of the general tax so leviable.

In pursuance of the above section the following notice was issued by the Municipal Commissioner :

It is hereby notified that the Standing Committee of the Corporation has, under the provisions of section 158 (2) of the City of Bombay Municipal Act, 1888, prescribed the following general conditions in supersession of those hitherto in force to be observed in granting allowances of one-fifth drawback of the general tax in respect of properties which are let to two or more persons in separate occupancies :

(1) Except with the special sanction of the Commissioner no claim for drawback shall be entertained, unless submitted to the Commissioner not less than thirty days before the commencement of the half year to which such claim relates.

(2) Drawback of one-fifth part of the general tax shall be sanctioned by the Commissioner in cases falling within either of the following cases and in no others, viz. :

(a) Chawls or buildings let out for hire in single rooms either as lodging or godowns for the storage of goods.

(b) Properties which, in the opinion of the Commissioner, are usually or frequently vacant, either wholly or partially.

(3) No sanction for drawback shall extend or apply to any floor on which any trade or manufacture is carried on, or any goods are sold.

Applicants for drawback should see the Assessment Department Ward Superintendents at their respective Ward Offices with reference to the second condition prescribed by the Standing Committee.

JUDGMENT OF THE HIGH COURT—(Sir C. Sargent, C.J., and
Bayley, J.)

We agree with the Judge of the Small Cause Court that the second and the third of the conditions prescribed by the Standing Committee under the provisions of section 158, clause (2), are not *ultra vires*, and justify the Commissioner in refusal of the drawback. The practical effect of them is doubtless to confine the right to drawback to buildings let on a particular class of holding, but if the Legislature had intended to exclude conditions in any way restrictive of that right, and by "prescribing conditions," nothing more was meant, as was suggested, than to lay down rules as to the time and manner of claiming the right to drawback we should have expected different language.

Moreover, the position of the sentence in the section, coming as it does immediately after the mention of the particular description of buildings, points to the conclusion that by the term "conditions" was contemplated a possible qualification or restriction affecting the nature or extent of the holdings already referred to. The Standing Committee, which is a select portion of the Councillors, might well be expected to exercise a sound discretion in deciding upon the necessary conditions. We may remark that the several buildings in question, although deprived of the right to drawback by the conditions, will still be entitled to a refund when the entries are such as to fall under the provision of section 175.

Costs of this reference to be costs in the municipal appeal, and to be taxed by the Taxing Officer of the High Court as on the Original Side of the High Court.

1893.

GOVERDHUN-
DÁS GOKUL-
DÁS TEJPAL
vs.
THE
MUNICIPAL
COMMIS-
SIONER.

DADABHAI DAJIBHAI BARIA, PLAINTIFF, versus PESTONJI
MERWANJI BHARUCHA, DEFENDANT.*

1893.

Feb. 10.

Contract—Consideration—Compromise of a bonâ fide claim a good consideration—Agreement to lend money on mortgage—Delay in completion of agreement—Subsequent agreement to pay interest from a certain date—Consideration for such agreement—Right to rescind—Time of essence of contract—Suit by lender against borrower.

On 31st August 1891 the plaintiff agreed to lend the defendant Rs. 30,000 on a

* Reported at I. L. R. 17 Bom. 457.

1893.

DADABHAI
DAJIBHAI
BARIA
vs.
PESTONJI
MERWANJI
BHARUCHA.

mortgage. By the agreement the mortgagor (defendant) was to clear the title, and the time fixed for completion of the agreement was eight days from its date. The mortgage was not completed within the stipulated time in consequence of the non-production of the title deeds by prior mortgagees, who were to be paid off out of the money to be advanced by the plaintiff. On the 9th September 1891 the plaintiff's solicitors wrote to the defendant reminding him that the time for completion had expired and stating that the plaintiff would require interest to be paid on the money which he had with him lying idle on the defendant's account. On the 24th September 1891 the plaintiff formally tendered the Rs. 30,000 to the defendant, but as no mortgage deed was then ready for execution, the money was not then paid. The plaintiff was always ready and willing to advance the money, but in consequence of the defendant's delay he insisted on interest being paid from the 24th September 1891. The title deeds were ultimately produced at the end of November or the beginning of December, and on 7th December 1891 the draft mortgage was sent to the defendant for approval. It contained a clause stipulating for payment of interest from 24th September 1891. On the 9th December 1891, the plaintiff had an interview with the defendant. The two points then discussed were, (1) what time after due date should be allowed to the defendant (mortgagor) for payment of interest, (2) whether interest on the principal sum should run from the 24th September 1891. On the first point the plaintiff gave way, allowing defendant fifteen days, instead of eight, as originally provided. As to the second point he declined to advance the money unless interest was paid from the 24th September 1891. The defendant ultimately agreed to this. The mortgage deed was duly engrossed with a stipulation for payment of interest from 24th September 1891, and the 26th January 1892 was fixed as the day for execution. On that day, however, one of the defendant's daughters, who had to execute the deed, was absent, and the plaintiff refused to advance the money until her signature was obtained. Subsequently the defendant refused to sign the deed on the ground that it contained the clause for payment of interest from 24th September 1891. He contended that he was not liable to pay interest from that date. The plaintiff brought this suit, claiming Rs. 1,865-12-0 as damages for the defendant's breach of agreement. The Small Cause Court held that, although the original agreement of 31st August 1891 mentioned no date from which interest should run, the defendant on the 9th December 1891 had agreed to pay it from 24th September 1891, and had made no objection on the point until February 1892. The defendant contended that if such an agreement was made on the 9th December 1891, it was without consideration, but the Court held that the plaintiff was at that date at liberty to rescind the agreement altogether, and that he had consented not to rescind in consideration of being paid interest from the 24th December 1891. The Small Cause Court accordingly passed a decree for the plaintiff.

Seemle, that time was not of the essence of the contract, but

Held, that in any case under the circumstances there was consideration for the agreement made by the defendant to pay interest from the 24th September. The plaintiff clearly regarded himself as entitled to rescind, and at the defendant's request agreed to forbear to do so if the defendant would consent to pay interest from the 24th September 1891. The claim of the right to rescind was undoubtedly a real one and made in good faith, and the forbearance to enforce it might well be an

inducement to the defendant to agree to the plaintiff's terms and the principle laid down in *Miles vs. New Zealand Alford Estate Company*⁽¹⁾ applied.

CASE stated for the opinion of the High Court under section 69 of the Presidency Small Cause Courts Act (XV. of 1882) by C. W. Chitty, Chief Judge.

1. This was a suit filed by the plaintiff to recover a sum of Rs. 1,865-12-0 as damages alleged to have been suffered by him in consequence of the defendant's breach of agreement to borrow from the plaintiff a sum of Rs. 30,000 on the security of three properties belonging to the defendant.

2. The original agreement for mortgage, as to which there is no dispute, bears date the 31st August 1891, and provides for a loan of the sum of Rs. 30,000 with interest at the rate of 9 annas *per cent. per mensem*. The mortgagor was to clear the title, and the time fixed for the completion of the agreement was eight days from its date.

3. The facts of the case, as found by me, were as follows:—The mortgage was not completed within the time stipulated in consequence of the non-production of the title deeds by prior mortgagees, who were to be paid off out of the moneys advanced by the plaintiff. The same solicitors, Messrs. Little, Smith, Frere, and Nicholson, were acting for both parties, and continued so to act up to the end of January 1892.

4. On the 9th September 1891 the solicitors sent a letter to the defendant reminding him that the time for completion had expired, and saying that the plaintiff would require interest to be paid on the money, which he had with him lying idle on the defendant's account. It was, however, thought that a formal tender should be made, and the sum of Rs. 30,000 was accordingly offered to the defendant on the 24th September 1891, but as no deed was then ready for execution, it was not paid. The idea of tender was no doubt erroneous, but it was from the date of the tender, 24th September 1891, that the plaintiff claimed that interest should run. Putting aside the question of tender as immaterial, I considered that it was nevertheless open to the plaintiff to decline to carry out the agreement, the time for completion of which had gone by,

1893.

DADABHAI
DAJIDHAI
BARIA
VS.
PESTONJI
MERWANJI
BHARUCHA.

(1) 32 Ch. D. 266.

1893.

DADABHAI
DAJIBHAI
BARIA
vs.
PESTONJI
MERWANJI
BHARUCHA.

unless the defendant agreed to pay interest on the money from that date, and this was in effect the position taken up by the plaintiff.

5. There was further delay owing to the non-production of the title deeds by the defendant, on whom it lay to clear the title. There was no imputation of laches on the part of the plaintiff, who was always ready and willing to advance the money, but, in consequence of the defendant's delay, insisted on interest being paid thereon from the 24th September 1891.

6. The deeds were ultimately procured at the end of November 1891 or beginning of December, and on the 7th December 1891 the draft mortgage was sent to the defendant for his approval. This draft contained a stipulation for the payment of interest from the 24th September 1891. The draft was read over to the defendant by his son, Kavasji Pestonji (they both read and understand English well), and certain pencil alterations were made by Kavasji; *inter alia*, the words "24th day of September 1891" were scored through with a pencil line and other words written in pencil above them.

7. On the 9th December 1891 the defendant and Kavasji brought plaintiff to Messrs. Little, Smith, Frere, and Nicholson's office, where the matter was discussed in the presence of Behramji Dinsha, the managing clerk. The two main points in dispute were, (1) as to what time after due date should be allowed to the mortgagor for payment of interest, and (2) whether interest on the principal sum should run from 24th September 1891. On the first point the plaintiff gave way, allowing defendant fifteen days instead of eight as originally provided. With regard to the second point, he declined to accede to the defendant's request, or to advance the money on any other terms, and the defendant ultimately agreed to pay interest from the 24th September 1891. The pencil alterations in the draft were then written in red ink by Kavasji, except with regard to the words "24th day of September 1891," where the pencil line and words written above were rubbed out by him. Kavasji then endorsed on the draft, "Approved as within altered for self and others, 9-12-91," and this was signed by the defendant.

8. There was some further delay on the part of the defendant in getting the necessary power of attorney from one of his prior mortgagees who was absent from Bombay, but ultimately the 26th

January 1892 was fixed as the day for execution. The mortgage deed was engrossed and contained the stipulation for payment of interest from 24th September 1891. On the 26th January 1892, the defendant, his wife, sons, and daughters (except Pirozbái) attended at the office of Messrs. Little, Smith, Frere, and Nicholson, to execute the deed which they were prepared to do. As, however, Pirozbái was absent, the plaintiff, acting on the advice of Mr. Nicholson, declined to advance the money until her signature was obtained, and another day was to be fixed for execution. No mention was at that time made of the date from which interest was to run, nor did the defendant or his sons raise any objection to the form of deed as engrossed.

9. In the beginning of February the defendant consulted other solicitors, but it was not until the 13th February 1892, when they had written for and obtained a copy of the agreement, that the present contention was raised, that the defendant was not liable to pay interest from the 24th September 1891. It is true that the agreement of the 31st August 1891 made no mention of the date from which interest should run, but I considered that that did not prevent the parties from subsequently making a verbal agreement which should be binding on the defendant. I found, therefore, that in this case the defendant did, on the 9th December 1891, agree to pay interest on the principal sum from 24th September 1891, and that he made no objection to such agreement until the 13th February 1892. It was argued that such agreement, if so made, was without consideration, but I held that the fact of the plaintiff being at liberty to rescind the agreement, and consenting not to do so on payment of the interest, was sufficient consideration for such verbal agreement.

10. It was further argued for the defendant that no suit for damages would lie in cases of this kind, and the case of *Bain vs. Fothergill*⁽¹⁾ and similar cases were cited. I held, however, that the law on such matters in this country was as laid down in sections 73 and 74 of the Indian Contract Act (IX. of 1872), and for the proposition that such cases fall without the purview of those sections I was bound by the decision of Farran, J., in the very similar case of *Datubai Ebrahim vs. Abubaker Moledina*.⁽²⁾

1893.

DADABHAI
DAJIBHAI
BARIA
vs.
PESTONJI
MERWANJI
BHABUCHA.

(1) 7 H. L. C. 158.

(2) I. L. R. 12 Bom. 242.

1893.

DADABHAI
DAJIBHAI
BARIA
vs.
PESTONJI
MERWANJI
BHARUCHA.

11. In this case I considered that damages should be awarded on the footing of the loss of interest sustained by the plaintiff from the 24th September 1891 until such date as he could be reasonably expected to be able to invest his money on a similar security. Farran, J., allowed four months from the date on which the defendant ultimately repudiated the contract, and I accordingly allowed a similar period, namely, four months from the 19th February 1892. The plaintiff's money or the major portion of it was on current account with the Hongkong and Shanghai Banking Corporation, where interest at the rate of 2 *per cent. per annum* was allowed up to the 31st December 1891, and 1 *per cent.* after that date. I accordingly deducted this from the contract rate of $6\frac{3}{4}$ per cent. and awarded to the plaintiff Rs. 1,197-11-2, being interest on Rs. 30,000, at $4\frac{3}{4}$ per cent. per annum from 24th September 1891 to 31st December 1891, and at $5\frac{3}{4}$ per cent. per annum from 1st January 1892 to 19th June 1892. I also awarded the plaintiff his costs of the abortive loan, the amount of which it was agreed should be the amount of the bill of costs, when taxed, including the costs of taxation, if allowed. I also certified the plaintiff's professional costs at Rs. 180.

12. The defendant's counsel requested me to state a case for the opinion of their Lordships on the following questions :

(1) Whether the defendant was bound to execute the engrossment of the mortgage-deed in the form presented to him on the 26th January 1892 ?

(2) If yes, whether he is liable to the plaintiff in any, and what damages ?

And I accordingly made my judgment contingent on such opinion.

13. The defendant has deposited Rs. 1,800 in Court as security for the plaintiff's claim, together with Rs. 50 to meet the costs of preference.

Anderson for defendant.

Lang and *Rivett-Carnac* for plaintiff.

JUDGMENT OF THE HIGH COURT (Sir C. Sargent, C.J.,
and Bayley, J.).

1893.

DADABHAI
DAJIBHAI
BARIA
vs.
PESTONJI
MERWANJI
BHARUCHA.

The answer to the first question whether the defendant was bound to execute the mortgage tendered to him by the plaintiff on the 26th January 1892 must depend upon whether the agreement by the defendant on the 9th December 1891, that the mortgage to be executed should contain a clause that interest should run from 24th September 1891 was binding on him. The Chief Judge of the Small Cause Court has found that the plaintiff on that day declined to accede to the defendant's request to advance the money unless the defendant consented to the above clause being inserted in the document, but it is said that there was no consideration for the agreement, and therefore that the defendant, if he thought proper, could change his mind, and declined to execute a mortgage except in the form prescribed by the contract, which provided that interest should run from the execution of the mortgage.

It appears from Mr. Chitty's judgment that he considered that the eight days mentioned in the contract was of the essence of the contract; and if this were so, it cannot be doubted that the plaintiff's forbearance to treat the contract as at an end on the 9th December, if the defendant agreed to the insertion of the clause, would be a good consideration for such agreement. But it was argued that time was not of the essence of this contract. We may remark that the case in I. L. R. 12 Bom. 242, which was referred to in argument by the plaintiff, has no bearing on that point. In that case subsequently to the execution of the contract, the parties definitely agreed that the contract should be finally settled on the 1st March 1887, and the only question for decision was as to the compensation the plaintiff was entitled to by the defendant's default in performing his part of the contract on that day. If it were necessary to decide the question, we can scarcely doubt that in such a contract it must be presumed that it was not the intention of the parties that the eight days mentioned in it should be of the essence of the contract. However, we think that, under the circumstances of this case, it is not material to decide the question, as the case of *Miles vs. New Zealand Alford Estate Company*⁽¹⁾

(1) 32 Ch. D. 266.

1893.

DADABHAI
DAJIBHAI
BARIA
VS.
PESTONJI
MERWANJI
BHARUCHA.

shows that there was good consideration for the agreement, although the plaintiff may not have had the strict right he claimed to have on the 9th December, of treating the contract at an end. The Judges in that case, although differing as to the application of the rule, under the circumstances of the case were all agreed that the forbearance to enforce a real *bond fide* claim is a good consideration for an agreement, although not one which the Court would have given effect to. Here, although the judgment of Fry, J., in *Green vs. Sevin*⁽¹⁾ shows that, strictly speaking, the plaintiff's right on the 9th December was not to rescind the contract, but to give the defendant notice that he would rescind if the defendant did not complete within a reasonable time (which in the present case would have been a very short period as the matter has been going on ever since 31st August), still the plaintiff clearly regarded himself as entitled to put an end to the contract, and agreed, at the defendant's request, to forbear to do so if the defendant would consent to pay interest from the 24th September 1891. The claim of the right to rescind at once was undoubtedly a real one and made in good faith, and the forbearance to enforce it might well be an inducement to the defendant to agree to the plaintiff's terms. We think that, under these circumstances, the principle laid down in *Miles vs. New Zealand Alford Estate Company*⁽²⁾ applies, and that there was, therefore, good consideration for the agreement of the 9th December 1891. The first question must be answered in the affirmative. As to the second question, it cannot be doubted that the plaintiff became entitled to compensation when the defendant finally refused to execute the mortgage with the added clause to which he had agreed, and no argument was addressed to us to show that the compensation was improperly assessed by the Small Causes Court either in manner or account.

The plaintiff to have his costs of the reference to be taxed by the Taxing Master as on the Original Side of the High Court.

Attorneys for plaintiff—*Little, Smith, Nicholson, and Bowen.*

Attorneys for defendant—*Ardesir, Hormasji, and Dinsha.*

(1) 13 Ch. D. 589.

(2) 32 Ch. D. 266.

GIRDHUR DAMODAR, PLAINTIFF, versus KASSIGAR HIRAGAR,
DEFENDANT.*

1893.
July 21.

Jurisdiction—Foreigner—Non-resident foreigner carrying on business by his munim in Bombay Presidency—Small Cause Courts Act (XV. of 1882), section 18.

Where a foreigner who did not reside in Bombay carried on business there by his munim,

Held, that under section 18 of the Presidency Small Cause Courts Act (XV. of 1882) the Small Cause Court in Bombay has jurisdiction to try a suit brought against him in that Court.

Per SARGENT, C.J.—*Prima facie* the word “defendant” in clause (b) of section 18 has the same meaning in each of the three cases in which that clause gives jurisdiction to the Court, and as the word clearly includes non-British subjects among the defendants over whom the clause gives jurisdiction if they are “resident” or “personally work for gain” within the territorial limits of the Small Cause Court, it would be a strained construction to hold that it did not include them among the defendants over whom the clause gives jurisdiction on the ground that they are “carrying on business” within the limits.

Although it is true that a non-British subject who does not personally carry on business within the territorial limits of the Court, does not make himself personally subject to the municipal law of British India, still by establishing his business in British India, from which business he expects to derive profits, he accepts the protection of the territorial authority for his business and his property resulting from it, and may be fairly regarded as submitting to the Courts of the country.

CASE stated by C. W. Chitty, Chief Judge, for the opinion of the High Court under section 69 of the Presidency Small Cause Courts Act (XV. of 1882).

The suit was brought by the plaintiff in the Court of Small Causes to recover from the defendant the sum of Rs. 1,300-11-6, being the price of goods sold by the plaintiff to the defendant in Bombay.

It was admitted that the defendant resided in Cutch out of the jurisdiction of the Court, and that he carried on business in Bombay by a munim. It was also the fact that no leave of the Court had been obtained for the institution of this suit.

Several defences were pleaded by the defendant at the trial, but the only one material to this report was the defence that the Court had no jurisdiction to try the suit. At the conclusion of the hearing the Chief Judge gave judgment for the plaintiff, but at the defendant's request he stated a case for the High Court. One of

* Reported at I. L. R. 17 Bom. 662.

1893.

GIRDHUR
DAMODAR
vs.
KASSIGAR
HIRAGAR.

the questions on which the opinion of the High Court was asked the following :

Whether the Court had jurisdiction, the defendant not being a resident in Bombay, or a British subject, but a resident of Cutch, and no leave having been obtained to file this suit ?

Macpherson and *Inverarity* for defendant.

Scott for plaintiff.

JUDGMENT OF THE HIGH COURT.

SARGENT, C.J.—The only question which has been argued before us in this Small Cause Court reference is whether clause (b) of section 18 of the Presidency Small Cause Courts Act (XV. of 1882) confers jurisdiction on the Small Cause Courts when the defendant is not a British subject, and resides outside the territorial limits of that Court, but is “carrying on business” by a *munim* within those limits. That such “carrying on business” need not be personal was, I think, not disputed. The decision of the Madras Court in *Muthaya Chetti vs. Allin*⁽¹⁾ on the same words in the Letters Patent, and the reasons given by Turner, C.J., for so holding, are, I think, conclusive. The soundness of the early decision of the Madras Court to the contrary in *Subbaraya Mudali vs. The Government &c.*⁽²⁾ was, I may remark, doubted by Sausse, C.J., and Arnould, J., in *Framji Cawasji vs. Hormusji Cawasji*.⁽³⁾

Passing to the real question in this reference, viz., whether the case of defendants carrying on business within the territorial limits of the Small Cause Court, which, it is to be observed, are the same as those of the High Court, must be restricted to British subjects, is not free from authority. In *Kessowji Damodar vs. Khimji Jairam*,⁽⁴⁾ Mr. Justice Scott construing similar words in section 12 of the Letters Patent, 1865, held that they must be confined to British subjects.

It is to be remarked at the outset that the general term “defendants” precedes and governs the whole of the clause (b), and therefore, *primâ facie*, it was intended to have the same meaning when read with each of the three several cases mentioned in the clause

(1) I. L. R. 4 Mad. 209.

(3) 1 Bom. H. C. Rep. 221.

(2) 1 Mad. H. C. Rep. 286.

(4) I. L. R. 12 Bom. 507.

as giving the Court jurisdiction; and as non-British subjects are clearly subject to the jurisdiction if they are "resident" or "personally work for gain" within the territorial limits of the Small Cause Court, it would be a strained construction of the clause to hold that they were excluded, when the ground of jurisdiction is that they are "carrying on business" within those limits. The learned Judge who decided *Kessowji Damoder vs. Khimji Jairam*⁽¹⁾ was not unconscious of this difficulty in excluding non-British subjects, but he held that he ought to disregard it, as "to do otherwise," he said, "would be a violation of the rule that every statute is to be construed and applied, so far as the language admits, so as not to be inconsistent with the comity of nations, or with the established rules of private international law."

There is no authority that I am aware of, nor was any referred to in argument, for there being a rule of construction couched in such very general terms. The rule, as stated by Lord Esher, M.R., in the important case of *Companhia de Mozambique vs. British South Africa Company*,⁽²⁾ is that the question whether the Courts of a nation will or will not entertain jurisdiction of any dispute is to be determined exclusively by such nation itself, *i. e.* by its municipal law. If by express legislation the Courts are directed to exercise jurisdiction, the Courts must obey. If there is a proper inference to the same effect, the result is the same. But there are certain rules which have by universal consent indicated the circumstances from which the inference may properly be drawn. One of those rules as stated by the Court in *Ex-parte Blain*⁽³⁾ is that, *prima facie*, all legislation is territorial in the sense, as stated by James, L.J., that unless the contrary is expressly enacted or plainly implied, legislation is only applicable to foreigners who, by coming into England whether for a long or short time, have made themselves subject to English jurisdiction, and accordingly the Court in that case held that the Bankruptcy Act is not to be construed so as to give the Court of Bankruptcy power to adjudicate a foreigner bankrupt, who, although a member of an English firm carrying on business in England, had never been in England,

1893.

GIRDHAR
DAMODAR
vs.
KASSIGAR
HIRAGAR.

(1) I. L. R. 12 Bom. 507.

(2) L. R. (1892) 2 Q. B. 558 at p. 394.

(3) 12 Ch. D. 522.

1893.

GIRDHUR
DAMODAR
vs.
KASSIGAR
MIRAGAR.

and had not committed any act of bankruptcy in England. The above principle was doubtless assumed in the decision of the Privy Council in *Lopez vs. Burslem*⁽¹⁾ and also by the House of Lords in *Jefferys vs. Boosey*,⁽²⁾ where it was held that the Copyright Act did not apply to foreigners resident abroad, and again in *Macleod vs. Attorney General of New South Wales*,⁽³⁾ the Privy Council held that an Act of the New South Wales Legislature which legislated as to the offence of bigamy, must be confined to an Act done within the territorial jurisdiction of New South Wales, but it is to be remarked that these were all classes in which the Legislature conferred a benefit or imposed a penalty as the consequence of some act done or omitted to be done, and, therefore, have no direct bearing on the construction of such an Act as that under consideration. The question is whether the Legislature did not intend to depart from the general territorial rule. It may be true that non-British subjects, who do not reside in British India, do not make themselves personally subject to the general municipal law of British India; still by establishing their business in British India, from which business they expect to derive profit, they accept the protection of the territorial authority for their business, and their property resulting from it, and may be fairly regarded by so doing as submitting to the jurisdiction of the Courts of the country. Moreover, in considering what was the true intention of the Legislature, it is right to bear in mind the special circumstances of the Presidency towns in this country as regards the great number of non-British subjects who carry on trade within them, either personally or by their *munims* and other agents, and are constantly having transactions with British subjects giving rise to causes of action both within and outside the Presidency towns, the latter of which do not fall under clause (a), a circumstance which might well affect the Legislature in determining the jurisdiction of the Presidency Courts as regards defendants.

These considerations coupled with the general language of the clause, which, as already observed, requires it to be construed as giving jurisdiction to try suits against defendants generally, who satisfy any one of the conditions mentioned in the clause irre-

(1) 4 Moo. P. C. C. 300.

(2) 4 H. L. C. 815.

(3) L. R. (1891) A. C. 455.

spective of their being British or non-British subjects, create, in my opinion, a strong presumption in favour of a less strict application of the territorial principles of construction above referred to than was adopted in *Kessowji Damodar vs. Khimji Jairam*,⁽¹⁾ and I cannot think that the above considerations are entitled to less weight because the construction would enable actions to be brought in the Presidency Courts against non-British subjects on causes of action arising out of British India or even out of India. Such causes of action would necessarily be personal actions to which the rule of territoriality has never been applied in England. It was argued, indeed, that the tribunals of other countries would not give effect to the judgment of the Small Cause Court in such cases, but such an argument is entitled to little weight, if, indeed, it is not quite irrelevant, as observed by Lord Hobhouse in delivering the judgment in *Ashbury vs. Ellis*⁽²⁾ in the following terms: "When a judgment of any tribunal comes to be enforced in another country, its effects will be judged of by the Courts of that country with regard to all the circumstances of the case."

Upon the whole, I am of opinion that the Small Cause Court had jurisdiction to try the suit, and the question as to the jurisdiction must, therefore, be answered in the affirmative.

STARLING, J.—In this case the plaintiff sues the defendant, who is the subject of a Native State, in respect of a cause of action arising wholly within the jurisdiction of the Bombay Court of Small Causes, alleging that he is carrying on business within the jurisdiction. The fact that the cause of action arose within the jurisdiction will not in this case justify the filing of the suit, because the leave of the Court was not obtained to its being filed in accordance with clause (a) or section 18 of Act XV. of 1882; consequently the only point which the Court has to consider is, whether a non-resident foreigner carrying on business within the city of Bombay can be sued in the Small Cause Court.

Now it seems to me that, in this case, we have nothing to do with questions of international law. All we have to do is to determine whether the defendant is a person against whom the Legislature has permitted a suit to be filed in the Courts of this country

1893.

GIRDHUR
DAMODAR
vs.
KASSIGAR
HIRAGAR.

(1) I. L. R. 12 Bom. 507.

(2) L. R. (1893) A. C. 333.

1893.

GIRDHUR
DAMODAR
vs.
KASSIGAR
HIRAGAR.

in which a decree can be passed and executed in this country against the property of the defendant within the jurisdiction, and against his person if he comes within the jurisdiction; and I am of opinion that the defendant, who admittedly has a firm in Bombay in which he carries on business through his *munim*, is such a person. In this conclusion I am supported by the case of *Ex-parte Blain*,⁽¹⁾ in which James, L.J., at page 526, says: "No doubt it (*i. e.* the English Legislature) has a right to say to a Chilian or to any other foreigner, If you make a contract in England, or commit a breach of contract in England, under a particular Act of Parliament, a particular procedure may be taken by which we can effectually try the question of that contract or that breach, and give execution against any property of yours in this country. But that is because the property is within the protection and subject to the powers of the English law. To what extent the decision of such a question would be recognised abroad remains to be considered, and must be determined by the tribunals abroad. If a foreigner being served with a writ appear, and the Legislature said 'If you do not appear you will commit a default in that way, and we will give judgment against you,' whether that judgment would under the circumstances be recognised by foreign tribunals as being consistent with international law and the general principles of justice is a matter which must be determined by them." Cotton, L.J., also at page 531, says: "We are not dealing with the question which might arise if an English Act of Parliament had expressly said that, as against a Chilian subject or any other alien who had never been in England, the Court should on certain facts being proved entertain a petition and make an adjudication. In such a case it might be the duty of the Court acting in the execution of the English Act of Parliament, whatever the consequences might be, and however foreign nations might object, to say, This is the English Statute and we must act on it, and the question which you, a foreigner, raise, we are bound to disregard."

Now these two passages seem to me fully applicable to this case. The Legislature has enacted that, if a person carries on business within the jurisdiction, a suit may be brought against him, and I do not think we ought to explain away the plain words of this

(1) L. R. 12 Ch. D. 522.

enactment, and say that it is not every person who carries on business within the jurisdiction who may be sued, but only British subjects. What a foreign Court might do, if a decree in such a suit were sued upon in such a Court, is not a question which we need discuss, and this is distinctly laid down in this case of *Ashbury vs. Ellis*.⁽¹⁾

Cases in Bankruptcy do not afford much help in the elucidation of the present question, for in such cases it is a local enactment extending to England only, and many of its provisions are of a highly penal nature.

In *Ex-parte Crispin*⁽²⁾ it was held that a foreigner who comes to England temporarily, contracts debts, and then commits an act of bankruptcy, can be made a bankrupt although he may be abroad at the time the petition is filed. This decision has never been disapproved of, but on the contrary was quoted with approval in *Ex-parte Pascal*,⁽³⁾ in which (at page 512) Mellish, L.J., cites that case, and holds that it makes no difference if the debt were contracted abroad. The real test in these cases is whether the defendant has done within the jurisdiction, either personally, or by his authorized agent, an act which brings him within the terms of the enactment applicable to his case, and I do not see any reason why the trading of a foreigner by his servants within the jurisdiction should not be held to be such an act.

The case of *Ex-parte Blain*⁽⁴⁾ has been relied upon by the defendant, and also by Scott, J., in *Kessowji Jaiaram vs. Khimji*,⁽⁵⁾ as showing that Acts, such as the Bankruptcy Acts, and the present one, cannot operate upon foreigners who reside outside the jurisdiction. I do not think that that is the effect of *Ex-parte Blain*.⁽⁴⁾ It seems to me that the *ratio decidendi* of that case was that the Chilean partners had never been within the jurisdiction, and consequently could not have personally committed an act of bankruptcy by a particular act of their agents (the English partners), which they had not authorized, and of which they had not cognizance, and that, as such was the case, the Court would not assume that the Legislature intended that an act of partners in England not authorized by the Chilean partners should operate upon the latter, who were not actually

1893.

GIRDHUR
DAMODAR
VS.
KASSIGAR
HIRAGAR.

(1) L. R. (1893) A. C. 339.

(3) L. R. 1 Ch. D. 509.

(2) L. R. 8 Ch. 374.

(4) L. R. 12 Ch. D. 522.

(5) I. L. R. 12 Bom. 507.

1893.

GIRDHUR
DAMODAR
VS.
KASSIGAR
HIRAGAR.

subject to the jurisdiction, in a case where the operation would result in a compulsory personal attendance in England. If this be the true view of that case, it in no way militates against the conclusion to which I have come.

It has never been doubted that under certain circumstances a suit could be brought against a foreigner, and the questions which have arisen have always been as to what was good service of the writ, generally whether it could be served as a matter of course, or whether leave of a judge must be obtained, or whether notice only of the action should be given. This remark applies to all the cases cited on the recent rules under the Judicature Acts as to suits against firms. Partners can now be sued in the name of their firm, and the questions that have arisen have been as to how service of the writ in the action was to be effected. The Judges have seemed to be of opinion that service as a matter of course in certain instances would be an infringement of international law, but yet it would appear that they admitted the possibility of the writ being served by a leave of a Judge. Consequently these cases, in my opinion, only apply to the construction of certain new and rather complicated rules of practice, which really do not give us any practical assistance in the present case. Besides which the question is, not whether a writ can be served, but whether an action can be brought. When one looks at the changes there have been in the rules themselves, and the divergent decisions of various Courts on the rules, it can hardly be said that the practice in England has at present been put upon a satisfactory basis so as to afford unerring guidance to us in such a case as the present.

Attorneys for plaintiff—*Bhaishanker and Kanga.*

Attorneys for defendant—*Little, Smith, Nicholson, and Bowen.*

1893
June 23.

HAJI ALLARAKHIA NATHU, APPELLANT, versus THE MUNICIPAL COMMISSIONER FOR THE CITY OF BOMBAY, RESPONDENT.

City of Bombay Municipal Act (III. of 1888), sections 142, 248—Halalkhor tax, on what premises leviable—Latrines on Port Trust property.

The appellant owned buildings situate on land belonging to the Port Trust, (1) of which appellant was the lessee. The Municipal Commissioner issued a notice in respect of such premises under section 248 (2) of the City of Bombay Municipal Act

(III. of 1888), in consequence of the existence in the adjoining street of latrines erected by the Port Trust for their tenants and the tenants' servants. There was admittedly no privy, urinal, or cesspool on the premises, nor any accumulation or deposit of excrementitious or polluted matter.

Held, that the latrines not being public latrines, the appellant was properly charged with halálkhor tax in respect of the said premises.

CASE stated for the opinion of the High Court under section 2 (1) of Act XII. of 1888, by C. W. Chitty, Chief Judge.

1. This is a petition of appeal filed by the appellant to recover from the respondent a sum of Rs. 64-12-10 paid to him by way of halálkhor tax in respect of two buildings, Nos. 5189—90, Kalyán Street, the property of the appellant.

2. The said buildings are situated on land belonging to the Trustees of the Port of Bombay, of which the appellant is lessee, and were erected and are now used by him as godowns for the storage of goods.

3. On the 27th August 1891 the respondent issued a notice to the appellant under section 248 (1) of the City of Bombay Municipal Act requiring him to furnish privy accommodation for the said premises. On the 14th March 1892, however, the respondent issued a second notice to the appellant under section 248 (2) that no separate water-closet, privy, or urinal was required.

4. The second of such notices was issued in consequence of the existence in a street adjoining the said premises of a set of latrines erected by the Port Trustees. Such latrines are erected on land belonging to the Port Trustees (the streets in that locality not being taken over by the Municipality) for the use of their tenants and the persons employed by such tenants. The latrines are flushed with water supplied by the Municipality, but are kept clean by halálkhors who are in the service of and paid by the Port Trustees by permission of the respondent under section 371.

5. It was admitted that there was no privy, urinal, or cesspool on the premises, nor any deposit or accumulation of excrementitious or polluted matter.

6. It was argued by the appellant's pleader that the latrines in respect of which the notice under section 248 (2) was given were public latrines, and that the case fell within the ruling of the High Court in Municipal Appeal No. 34 of 1892. No doubt these

1893.
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HAJI ALLAH
RAKHIA
NATHU
vs.
THE
MUNICIPAL
COMMISSIONER.

1893.

HAJI ALLA-
BAKHIA
NATHU
vs.
THE
MUNICIPAL
COMMISSIONER.

latrines can be and probably are resorted to by passengers in the vicinity of the street where they are situate, as the public are in no way excluded from such streets by the Port Trustees. This, however, was the case in Municipal Appeal No. 41 of 1892, where the privies and latrines adjoining the cloth and cutlery markets of Sir Mungaldás Nathubhai were so used. I am of opinion that these are not public latrines in the sense referred to in my statement in Municipal Appeal No. 34 of 1892, and that the tax is properly chargeable.

7. The appellant's pleader requested me to state a case for the decision of the High Court. I therefore refer it to their Lordships to decide, whether, on the facts as stated above, the appellant is liable to pay the halálkhor tax in respect of the said premises.

8. The appellant has deposited in Court Rs. 50 to meet the costs of reference.

JUDGMENT OF THE HIGH COURT—(Sir C. Sargent, C.J.,
and Starling, J.)

The latrines not having been erected for passengers, but erected for the tenants of the Port Trust, to which the public were admitted on sufferance, were not public latrines. They therefore come under clause 2 of section 248, and the appellant's premises are therefore liable to be taxed under clause 3 of section 142, and the question must be answered in the affirmative.

Costs of reference to be costs in the cause, and to be taxed by the Taxing Officer of the High Court as on the Original Side.

1893.

July 8.

VAGHJI THAKERSI AND ANOTHER, PLAINTIFFS, versus
PRAGJI DEVJI, DEFENDANT.

Landlord and tenant—Sub-tenant—Transfer of original lease—Continuance of sub-tenancy under the new lessee.

Premises belonging to the Port Trustees were let by them to B. P. by yearly agreements, terminating in each case on the 31st December in each year. The defendant occupied the premises as sub-tenant of B. P., the rent to the Port Trustees being paid sometimes by B. P., but more often by the defendant. In March 1891 B. P. became insolvent, and from the 1st October 1891 the plaintiffs took over the premises from the Port Trustees. The defendant had notice of the transfer, and acquiesced in it. In a suit against him by the plaintiffs for rent, or,

in the alternative, for compensation for use and occupation of the premises from the 1st November 1891.

Held, that the defendant's sub-tenancy must be taken to have continued under the plaintiffs, and that the suit was maintainable.

CASE stated for the opinion of the High Court under section 69 of the Presidency Small Cause Courts Act XV. of 1882, by C. W. Chitty, Chief Judge.

1. This was a suit brought by the plaintiffs to recover from the defendant a sum of Rs. 960, as rent for two compartments, Nos. 4 and 6, in E gully of the Ryan Market from the 1st November 1891 to 31st October 1892, at Rs. 80 *per mensem*, or, in the alternative, as compensation for the use and occupation of the same compartments for the same period.

2. The said compartments, which are the property of the Trustees of the Port of Bombay, were formerly let by them to one Bhimji Pardhan by yearly agreements, terminating in each case on 31st December in each year, the last of such agreements being for the year 1890. During the latter portion of Bhimji Pardhan's tenancy the defendant occupied the compartments as the sub-tenant of Bhimji Pardhan. The bills of rent were made out in Bhimji Pardhan's name, and were paid to the Port Trustees, sometimes by Bhimji Pardhan, but more often by the defendant.

3. In March 1891 Bhimji Pardhan filed his petition in the Insolvent Court. Prior to October 1891 it was arranged that Bhimji Pardhan should surrender the compartments to the Port Trustees, and that the plaintiffs should take them over as from the 1st October 1891 at the same rent, viz. Rs. 80 *per mensem*. To this arrangement Bhimji Pardhan signified his consent by a notice addressed to the Port Trustees, and the plaintiffs signed an agreement to rent the compartments from the 1st October 1891.

4. The defendant had notice of the transfer. At an interview between him and the second plaintiff Purshotum Umersi, the latter told him that the compartments had been transferred, and the defendant replied "Very well." The second plaintiff then said, "Hereafter if you pay rent to the Port Trust, pay it in our name, or pay it to us." The bills from the 1st October 1891 were made out in the plaintiff's name, and that for October was by an error of the bill collector presented to the defendant, who paid the amount. Since

1893.

VAGJI
THAKURSI
CS.
PRAGJI
DEVJI.

1893.

VAGJI
THAKERSI
VS.
FRAGJI
DEVJI,

the 1st November 1891 the bills were presented to the plaintiffs and paid by them to the Port Trustees.

5. The defendant did not deny that he had been and still was in possession of the premises, or that he was liable to pay the rent. He denied, however, that he was the tenant of the plaintiffs or was in any way liable to them. I held that he was not a mere trespasser, but that his sub-tenancy must be taken to have continued under the plaintiffs, and that even if he was not a tenant-at-will of the plaintiffs he was a tenant on sufferance, and as such liable to them for use and occupation. I accordingly passed a decree in favour of the plaintiffs for the amount claimed and costs, and certified their professional costs at Rs. 51.

6. As the defendant's attorney requested me to state a case for the opinion of the High Court, my judgment will be contingent on the opinion of their Lordships on the question whether on the facts as stated above the plaintiffs are entitled to maintain this suit.

The defendant has deposited in Court the amount of the decree and costs and Rs. 50 to meet the costs of reference.

JUDGMENT OF THE HIGH COURT.—(Sir C. Sargent, C.J.,
and Starling, J.)

The question must be answered in the affirmative. Plaintiffs' costs to be costs in the cause, to be taxed by the Taxing Officer as on the Original Side.

1893.

Dec. 18.

DAYAL MOWJI, PLAINTIFF, versus NANBAI, WIDOW, AND
ANOTHER, DEFENDANTS.

Civil Procedure Code (Act XIV. of 1882), section 506—Reference to arbitration—Consent of parties—Pleadings to be authorized in writing—Application to be in writing—Revocation of order—Practice.

Where one of two defendants was present in Court and his pleader on his behalf and on behalf of the absent defendant consented to an order being made referring all matters in difference between the parties to arbitration, but the pleader was not specially authorised in writing in that behalf and the application was made, not in writing, but orally,

Held, that the order of reference was invalid and that the Court making it had power to revoke it.

Held, further, that the order must be revoked in spite of the fact that the second defendant had been guilty of laches in not bringing the matter more speedily to the notice of the Court.

CASE stated for the opinion of the High Court under section 69 of the Presidency Small Cause Courts Act (XV. of 1882), by C. W. Chitty, Chief Judge.

1893.
DAYAL MOWJE
VS
NANBAI.

1. This was a suit brought by the plaintiff to recover from the defendants certain ornaments or the value thereof, Rs. 1,997.

2. On the 20th of February 1891 the suit was (for reasons which it is unnecessary now to state) adjourned *sine die*. In the early part of this year it was by order of the Court brought on the board again, and on 6th March 1893 was struck out for non-appearance of parties. It was however restored to the file on the 15th of June 1893, and by consent adjourned to the 28th June 1893.

3. On the 28th June 1893 Mr. Balkrishna appeared for the plaintiff, and Mr. Payne for both the defendants, when by consent all matters in difference in the suit were referred to the sole arbitration of Mr. Gunpatrao Nanabhai, one of the Interpreters of this Court, the award to be made within fourteen days without power of extension.

4. On the 29th June the arbitrator gave notice to the parties, appointing Friday the 30th June, at 5-30 P.M., as the time when he would proceed with the investigation. On the 30th June, at 4-45 P.M., Mr. Payne, accompanied by his clerk, Meherali Mahomed Patel, applied to the arbitrator to fix some other day for the meeting. At Mr. Payne's request, and for his convenience, the meeting was peremptorily fixed for Wednesday the 5th July, at 3-30 P.M.

5. On the 5th July in the morning Mr. Payne appeared before me, and applied for a rule *nisi*, calling on the plaintiff to show cause why the order of reference should not be set aside, and why the suit should not be set down for hearing, and why in the meantime all proceedings before the arbitrator should not be stopped. The application was supported by an affidavit of the said Meherali Mahomed Patel, in which he stated that Mr. Payne had consented to the reference on information supplied by him, the parties not then being in Court, and that he had no special authority from the defendant in that behalf.

6. As it appeared that Mr. Payne had not been specially authorised in writing to consent to the reference, and that the application for reference was not in writing as prescribed by section 506 of the Civil Procedure Code, I granted the rule *nisi* as prayed.

1893.

DAYAL MOWJI
VS.
NANBAL.

7. The rule came on for hearing before me on the 12th July 1893, when Mr. Nicholson for the plaintiff filed affidavits of Mr. Balkrishna, his clerk Atmaram Babaji, and the plaintiff, from which it appeared that the second defendant, Shamji Mulji, was actually present in Court on the 28th June when the consent order was made. The first defendant was not present on that occasion. I was however of opinion that both defendants would be bound by the consent given on their behalf by the attorney whom they had duly authorised to conduct the suit.

8. At the same time it appeared to me doubtful whether the order of reference could be regarded as valid, inasmuch as the provisions of section 506 of the Civil Procedure Code had not been observed. I should mention that the first paragraph of that section applies to all suits filed in this Court and the whole section to suits (like the present) of more than Rs. 1,000 in value. At the same time it has never, so far as I can ascertain, been the practice of any of the Judges of this Court to demand any written authority from a pleader consenting to a reference, nor has it been the practice in the Chief Judge's Court to require a submission paper signed by the parties. No question has ever arisen as to the validity of an order of reference, nor has any such order been set aside on the ground now urged.

9. I was of opinion that the defendants, and more especially the second defendant, had been guilty of laches in not bringing the matter more speedily to the notice of the Court. It is somewhat extraordinary that no affidavit was filed by the defendants or either of them in support of the application made on their behalf by Mr. Payne, the only statement being that of the managing clerk, Meherali Mahomed Patel. I apprehend that in no case will such an application as the present be entertained, except upon the strongest possible grounds, and, so far as the merits of this particular case are concerned, there can, I think, be little doubt that the application of the defendants ought, if possible, to be refused.

10. As the matter is one of such importance in its bearing on the practice of this Court, and as both parties desired me to state a case, I submit for the opinion of their Lordships the following questions, which were suggested by the defendant's attorney :

(1) Whether in absence of any special written authority to the

pleader and of any written application for reference the order of reference was valid?

(2) Whether this Court has power to revoke such order as being a final order in the case?

(3) Whether the delay of the second defendant is a bar to the granting of this application?

(4) Whether, if their Lordships should be of opinion that the order of reference cannot be set aside, this Court can now extend the time for making the award, the consent to the order having been given on an express condition that it should be made within a time which has now expired?

11. I have reserved my judgment on the rule pending the receipt of their Lordships' answer to the above questions. The parties have deposited in Court Rs. 50 to meet the costs of reference.

JUDGMENT OF THE HIGH COURT.

The first question must be answered in the negative, the second in the affirmative, and the third in the negative. The fourth question needs no reply. Costs of reference are to be costs in the case, to be taxed by the Taxing Master of this Court as on the Original Side.

KUVERBA'I, WIFE OF KESSOWJI LALJI, PLAINTIFF, versus
KESSOWJI LALJI, DEFENDANT.

1893.
Dec. 18.

Hindu Law—Agreement by husband to pay a monthly sum for maintenance of his wife—void for want of consideration.

The plaintiff was the wife of the defendant, a Hindu. The parties lived together, but differences having arisen between them, the defendant, in order to put a stop to such differences, passed to the plaintiff a writing whereby he agreed to pay her Rs. 10 a month for her maintenance. In a suit by the plaintiff on the agreement,

Held, that there was no consideration to support it and that it was void under Hindu Law.

CASE stated for the opinion of the High Court under section 617 of the Civil Procedure Code by Ganpatrao Bhasker, Second Judge.

1. One Kuverbái, aged 60, sued her husband Kessowji Lalji, aged 70, to recover Rs. 110, being the amount of monthly payments due to her from 1946 Aso Vad 5th to 1949 Kartik Vad 4th (1st

1893.

KUVERRAI

18

KISSOWJI

LALJI.

November 1890 to 8th November 1892), being twenty-five months, at Rs. 10 a month, after giving deductions, according to the agreement of the husband, which has been put in and marked Exhibit A.

2. Defendant raised, amongst others, the principal issues, namely, that the agreement was not good and binding under the Hindu law, and that there was no consideration for the agreement.

3. These are the issues for my consideration. Defendant cited West and Bühler, page 254, Note E. He also suggested that the document was not executed by the defendant. On this point I held it was executed by him, because the payments under it have appeared in the books, which have been inspected by the defendant.

4. With reference to the first point, whether under Hindu law there is consideration to support the document, West and Bühler in their work on Hindu Law (3rd Edition, Volume I, page 254, Note E,) remark, "The contracts which have sometimes been relied on, even if consistent with the relation of husband and wife, must in nearly all cases fail through the operation of the principles embodied in sections 14 and 16 of the Indian Contract Act (IX. of 1872) and the Indian Evidence Act (I. of 1872) section 111. See *Nurbadabai vs. Mahadev Narayan*⁽¹⁾ and the references. In England there can be no contract between husband and wife, *Legard vs. Johnson*,⁽²⁾ nor can any agreement between them alter her legal capacities as a married woman: *Marshal vs. Rutton*.⁽³⁾ The same rules hold under the Hindu law by which the wife's dependence and the husband's dominion and obligations are as strongly recognized as by the English law and in a way remarkably analogous to it."

5. Dr. Gurudas Bannerji in his Tagore Law Lectures on the Hindu Law of Marriage and Stridhan, pages 114—116, observes as follows :

"I now proceed to notice the legal consequences of marriage under the Hindu law, and first those relating to the persons of the parties.

"It follows from the very nature of the matrimonial relation that the husband and the wife must each be entitled to the society of the other. It is one of the express conditions in the nuptial vow of the Hindus that each party is to become the associate of the other. Accordingly Manu declares, 'Let mutual fidelity continue till death.' 'Let a man and a woman united by marriage, constantly beware, lest at any time disunited they violate their mutual fidelity.' And the

(1) I. L. R. 5 Bom. 99.

(2) 3 Ves. 352, 358.

(3) 8 T. R. 545.

sages denounce the desertion or neglect of either party by the other without just cause as an act punishable in this world and in the next. While the wife is directed to revere the husband as a god, the husband is likewise required to honour a virtuous wife. Nor is conjugal association limited to temporal purpose alone: religious rites are ordained in the Vedas to be performed by the husband in company with the wife. So sacred and peculiarly favoured is the association between man and wife in the eye of the law, that our Penal Code, while punishing the harbouring of offenders generally, does not regard it an offence when the harbouring is by the husband or wife of the offender.

"So far the duties of the husband and the wife with respect to each other's person are reciprocal. But perfect equality of rights in the married couple has never yet been allowed by any system of law. Without denying the position maintained by some of the most advanced thinkers of our age, that conjugal society in equality is the best form of that society, it must be admitted that such equality is practically allowable only for persons of a high degree of culture, and that in the majority of cases some form of domestic government is necessary to prevent disorder and discord, which would otherwise inevitably arise from the conflict of opposing wills, both equally supreme, in persons bound to live together. And if there must be inequality, it is not difficult to see that it must be in favour of man. 'In his hands,' to use the language of Bentham, 'the power maintains itself. Give the authority to the woman, and every moment a revolt would break out on the part of the husband. This inequality was originally very great, but the tendency of society has been to reduce it as far as possible.' The Hindu law in respect of this inequality partakes, to some extent no doubt, of the character of other archaic systems, but on the whole, as you will see in the end, it is far more equitable towards the female sex than most of these systems.

"As a rule, in the Hindu law the state of woman is one of perpetual tutelage. 'Their fathers,' says Manu, 'protect them in childhood, their husbands protect them in youth, their sons protect them in age. A woman is never fit for independence.' Youth in this text is explained by Kulluk to mean coverture. The same rule is laid down by other sages, and adopted by authoritative commentators, such as Vijnaneshwar and Sulpani. Accordingly after marriage a woman, whether a major or a minor, comes under the protection and guardianship of her husband. If the husband is himself by reason of minority, or the like, under the authority of another, the wife comes under the control of that other. This is perhaps what is indicated by the fact that by marriage a woman's *gotra* or connection by birth with her primitive stock is by fiction of law supposed to be changed and she is regarded as affiliated to the *gotra* of her husband. It is a change of no consequence, but seems to have meant at one time the transfer of a woman from the patriarchal authority of one family to that of another. This incident of marriage had its counterpart in the Roman Law, by which the wife came under the *manus*, or authority, of her husband by being supposed to become his daughter."

1893.

KUMARBÁI

vs.

KESROWJI

LALJI.

1893.

KUVERBÁI
vs.
KESQWJI
LALJI.

6. Kuverbái, who was examined before me, has stated that she found fault with her husband as regards his conduct towards their daughter-in-law. The husband, on the other hand, stated that on his demanding back certain ornaments from Valji, the plaintiff's brother, which he had in possession, quarrels arose, and to put a stop to them the document sued upon was passed. But whatever may have been the cause, this is certain to my mind that there were quarrels between the husband and wife, and the former has passed a document to pay Rs. 10 a month to the latter to allay such quarrels.

7. According to English law in *Ellen Victoria Hughes vs. Arthur John Hughes*,⁽¹⁾ it was held that a suit is not maintainable by a wife for an allowance from her husband on an agreement for which the sole consideration is a stipulation that the wife is not to communicate with or molest her husband, such stipulation falling within the general rule that a deed of separation entered into by husband and wife without the intervention of trustees is void.

8. The Hindu law being as I have quoted above, and the husband and wife being together as good wife and husband, I have come to the conclusion that the agreement is not good and binding under the Hindu law and that it is without consideration and not binding on the defendant. I have therefore dismissed the suit.

9. But this dismissal is contingent on the opinion of their Lordships the Judges of the High Court on the question, on which I have reasonable doubt, whether there is consideration under the Hindu law to support the agreement. If there is, then my judgment must be reversed, and a decree passed for the plaintiff. If it be held that there is no consideration, then my judgment will stand.

JUDGMENT OF THE HIGH COURT.—The question must be answered in the negative.

(1) W. & W. R. 250.

JETHABHAI SIVJI AND OTHERS, PLAINTIFFS, versus J. A.
SHEPHERD AND ANOTHER, DEFENDANTS.

1894.
Jan. 13.

Contract—Railway receipt—Conditions—Port Trust charges—Charges in force on Shipping Lines—Liability of consignee.

The plaintiffs consigned cotton for carriage to Bombay by the Southern Mahratta Railway Company, the West of India Portuguese Railway Company, and the defendants' firm the Bombay Steam Navigation Company. The contract between the parties was contained in the railway receipt granted by the Southern Mahratta Railway Company, in which the goods were said to be consigned to Bombay station *vid* Marmagao at certain rates therein stated. The railway receipt contained numerous conditions, one of which was that "goods booked to Bombay or elsewhere by sea, *vid* Marmagao, are subject to rules and regulations, conditions of carriage, wharfage and other charges in force on the railways and the shipping lines over and by which they are conveyed." On the arrival of the goods at Bombay the plaintiffs were compelled to pay charges over and above the charges specified in the railway receipt, *viz.* Port Trust charges at 2 annas a bale. Such charges were paid by them under protest and they now sought to recover the same from the defendants.

Held, that such charges fell within the words in the condition above set out and that the plaintiffs could not recover.

CASE stated for the opinion of the High Court under section 69 of the Presidency Small Cause Courts Act (XV. of 1882) by C. W. Chitty, Chief Judge.

This was a suit brought by the plaintiff to recover from the defendants a sum of Rs. 507-14-0, being the amount of Port Trust charges levied in Bombay at the rate of 2 annas a bale in excess of the freight for which they had undertaken to carry consignments of cotton from Gadak and Hubli, stations on the Southern Mahratta Railway, to Bombay. The plaintiffs also sought in the alternative to recover the same sum as damages sustained by them in consequence of the defendants having placed their (the plaintiffs') property in such a position as to necessitate payment of the said charges in order to obtain delivery of such property.

2. The facts, as to which there is little or no dispute, are fully set out in the judgment of the Fourth Judge. Except as stated in my judgment, I concur in the findings of fact of the Fourth Judge.

3. The Fourth Judge, for the reasons stated in his judgment, passed a decree for the plaintiffs for the amount claimed with costs and certified Rs. 85 as the plaintiffs' advocate's costs. On an application to the Full Court composed of myself and the Fourth Judge,

1894.

JETHABHAI

SIVJI

vs.

J. A. SHEP-

HERD.

we granted a rule *nisi*, and after hearing the arguments of both parties I was of opinion that the decree should be set aside and a verdict entered for the defendants. My reasons for so thinking are stated in my judgment, and are practically the same as those which influenced my decision in another suit against the present defendants, and in a third suit against the Southern Mahratta Railway Company, which was the subject of an application to the High Court (see I. L. R. 17 Bom. 14).

4. The Court being divided in opinion, my judgment prevailed, and the decree was accordingly set aside and a verdict entered for the defendants, contingent on the opinion of the High Court on a case to be stated. On the question of the costs of this suit and of the rule *nisi* we reserved our judgment pending the decision of the High Court. The sole question for their Lordships' determination appears to be, whether, on the facts as stated and the documents put in evidence in the case, the plaintiffs are entitled to recover the amount of these charges from the defendants.

The Fourth Judge, Mr. Hormasji Dadabhai, concurred in making the reference as above stated. The following was the judgment of the Fourth Judge :

It was stated by the learned counsel for the defence that demands similar to that advanced in this case have been decided adversely to the claimants by the learned Chief Judge and other Judges of this Court, and I regret to find myself under the necessity of differing from them. This casts upon me the duty of giving the reasons for my judgment at greater length than I should otherwise have done. Plaintiffs are cotton merchants in Bombay. They seek to recover from the defendants, who carry on business in the style of the Bombay Steam Navigation Company, the sum of Rs. 507-10-4, being the amount of what are called Port Trust charges levied in Bombay at the rate of 2 annas per bale in excess of the freight for which they had undertaken to carry consignments of cotton from Gadak and Hubli, both stations on the Southern Mahratta Railway line. They prefer in the alternative a claim to the abovementioned sum as damages sustained by them in consequence of defendants placing their (plaintiffs') property in such a position as to necessitate the payment of the said charges in order to obtain delivery of it. The material facts are as follows:—4,063 bales of cotton were entrusted to the Southern Mahratta Railway Company in respect of which they granted railway receipts, all in the form of Exhibit No. 1. This acknowledges the receipt of the goods for conveyance to Bombay station. Three separate charges are noted on it, so much for the Southern Mahratta Railway Company, so much for the West of India Portuguese Railway, and so much for the Bombay Steam Navigation Company. These three sums are added together

and a lump sum is inserted in the column of remarks. The transit is partly by railway and partly by sea. Prior to December 1890 the British India Steam Navigation Company brought the goods from Marmagao to Bombay and landed them at the Prince's Dock in charge of the Port Trust, they themselves paying the Port Trust charges. Intimation was then conveyed to the parties concerned in the form of Exhibit No. II., with one important exception, *viz.* no demand was therein inserted for the Port Trust charges. They never pretended to any claim of that sort, and there is no foundation for the suggestion of Mr. Russell, that the charges were forborne as a matter of favour. On presentation of Exhibit No. I, and payment of the freight therein mentioned, a delivery order was handed to the consignee or his servant in the form of Exhibit A. When the defendants succeeded to this business, no notice was given that they contemplated a departure from the course uniformly followed by their predecessors. They made an addition, however, to Exhibits A. and No. II. of P. T. (Port Trust) charges at 2 annas per bale. No delivery order was issued until the consignee paid the stipulated freight plus these charges. In other respects there was not any material variation. The whole of the foreshore is vested in the Port Trust. Under section 43 of Bombay Act VI. of 1879 they are authorized to frame a scale of charges to be levied upon goods for (1) landing, (2) wharfage, (3) cranage, and (4) storage of goods at any dock in the possession of the Board. In the book of charges published in virtue of this power (Exhibit III.), in the column headed Imports, wharfage at 2 annas per bale of cotton is mentioned as the proper charge. The Act creates a lien in favour of the Port Trust to that extent. In the first instance the consignee has to pay the charge, but this does not affect the rights and liabilities of the shipowner and consignee *inter se*. It is of the utmost importance in this case to ascertain the exact nature of the services creating this lien. The Dock Supervisor describes them as follows :—(1) unhooking the sling from the ship's side, (2) removing the goods from the wharf into a shed, (3) sorting them, (4) stocking them, (5) delivering them to the consignee, (6) and accounting for them to the shipowner. It is abundantly clear from this detailed explanation that the charge is essentially for the landing of the goods and delivering them to the owners. It so happens that in order to ensure despatch, the Port Trust employ the defendants to do these services and to collect their dues, paying to them a certain percentage as their remuneration.

Exhibit C. is the original and Exhibit No. IV. the amended agreement between the defendants and the West of India Portuguese Railway. The former provides that the rate in Exhibit No. I. includes all landing charges at Marmagao and Bombay. The 14th clause is to this effect: "The Bombay Steam Navigation Company shall land and deliver the goods to the consignees from their godowns in Bombay." In May 1892 defendants thought it expedient to modify Exhibit C., but of this they gave no notice to the public. In the letter of 22nd December 1891 (Exhibit D.) they say "the same rates are now in force on that line (Southern Mahratta Railway Company) and have been adopted by ourselves for through booking of goods." At the same time they forwarded to the plaintiffs the book of rates of the Southern Mahratta Railway Company (Exhibit E).

1894.

JETHABHAI
SIVJI
vs.
J. A. SHEP-
HERD.

1894.

JETHABHAI
SIVJI
vs.
J. A. SHEP-
HERD.

It is entirely silent as to any additional charge. The principal question, which the facts raise, is, who is ultimately bound to pay the Port Trust charges. That depends on what is the contract between the parties. Beyond all question the whole contract is incorporated in the railway receipt. Mr. Russell maintained that it ought to be construed with reference to its subject-matter. Mr. Shepherd admitted his liability to deliver the bales according to Exhibit No. I. A railway company undertakes to convey them to Bombay for a lump sum. This necessarily involves the further undertaking on its part to deliver them to the consignee for the stipulated price. Section 54 of Act IX. of 1890 allows the company a certain degree of latitude in imposing any conditions as to the "delivery" of the goods, but it has not availed itself of it in the present case. Why should the Court import into such a contract unambiguous in its terms all or any of the usages by which bills of lading are governed? It was argued on the part of the defendants that, regard being had to the customary mode of discharging cargo, they were free from all liability the moment the goods left the ship's deck, and *Petrocochino vs. Bott* (1) was cited in support of this proposition. The class of cases, of which that and *Moore vs. Harris* (2) are familiar examples, all turned on the wording of the bills of lading declaring in express terms that the goods were to be "delivered from the ship's deck, where the ship's responsibility shall cease." No such agreement is alleged in this case. Defendants are then forced to take up another position quite as untenable. The cargo having been discharged in the Prince's Dock, which is the customary mode, delivery to the Port Trust is equivalent to delivery to the plaintiffs. This sentence is compounded of an incorrect statement of fact and an illogical deduction of law. Assume it to be true, what then? As observed by Latham, J., "Usage may control the place or manner of delivery; the question of what payment is to be made before delivery seems to stand on a different footing" (*Scott vs. Finlay*). (3) The onus still lies upon the defendants to show that plaintiffs could have acquired possession of his property from the Port Trust with complete dominion and control over it for the stipulated price. It is the carrier's duty not only to carry, but also to deliver (*Brown's Carriers Law*, page 195). For convenience and not in consequence of any default on plaintiffs' part their ships entered the docks and unloaded the cargoes there. If that be the true position of the defence, then it is undistinguishable from *Scott vs. Finlay* (*supra*). The test there suggested by Bayley, J., is equally applicable to this case. Had the goods been damaged while in the process of being removed from the vessel and deposited on the wharf, the loss would have fallen on the ship-owner. That plainly indicates that the Port Trust are the agents of the ship, and not of the owner of the cargo. Suppose as Mr. Robertson put it the freight had been prepaid, could the defendants have successfully maintained a right of lien on the goods questioned. I clearly think not. The case is otherwise where the consignee does not appear to claim and receive them. The master may land and warehouse them, and then the

(1) L. R. 9 C. P. 355.

(2) L. R. I. A. C. 318.

(3) I. L. R. 7 Bom. 386, *ante* page 114.

consignee will be liable for expenses incurred in doing so (Carver's Carriage by Sea, p. 457—*Stewart vs. Rogerson*⁽¹⁾). The ultimate responsibility for the Port Trust charges, in other words, for the landing and delivering charges, as between the shipowner and the consignee must be held even on this the most favourable view of the defence to rest with the Bombay Steam Navigation Company. The same result is arrived at if, instead of resorting to a mere hypothesis, we consider the actual agreement and ascertain the intention of the parties, the intention to be judged of from the expressions used in Exhibit No. I. and not by a reference to what might or ought in fairness to have been the intention. The Southern Mahratta Railway Company received the goods upon an agreement to convey them to Bombay station for a particular price. At the intended destination the company becomes entitled to the promised reward, and the consignee to delivery on such payment. It is immaterial to the latter what and how many contracts the company makes to perform the transit, or how the price of the conveyance is apportioned. This obligation is one and indivisible, and begins on acceptance of the railway receipt in which is enunciated the whole agreement. This duty ends on payment of the stipulated reward. The last clause endorsed on the railway receipt expressly provides that the delivery order shall be issued on delivery of the railway receipt. Now the words "Bombay station" may mean any place, any wharf, any warehouse, any depôt within the limits of the city. The carrier may deposit the goods at any of these places, but the law, his contract, and the nature of the transaction all require that he should create no further charge; the expenses of and consequent upon such delivery at the places indicated must be borne, in the absence of any agreement to the contrary, by himself. Having no godowns of his own, for his convenience he employs the agency of the Port Trust, whose lien attaches the moment the goods are put on the wharf. He should pay the charge in order to obtain the free delivery. Any agreement exonerating him from this liability must lead to the absurd conclusion that he could do indirectly what it is not permissible to him to do directly, i. e. shift the responsibility from his shoulders on to those of plaintiffs by the simple contrivance of calling in the aid of the Port Trust. Much of the confusion in these cases have arisen, I think, from not distinguishing the two characters filled by the Port Trust and the defendants in this transaction. The former are agents of the latter for rendering the terminal services and consequently for the exaction of the Port Trust charges. The latter are agents of the former for performing the same services and collecting the dues in consideration of 10 per cent. allowed to them. In the face of their agreement with the West of India Portuguese Railway Company, are the defendants entitled to urge that delivery from their godowns means the same thing as the godowns of the Port Trust? and if they meant the same thing, why was not the agreement modified by inserting the words "from the godowns of the Port Trust?" or by the addition to it of the words "but excluding wharfage levied by the Port Trust of Bombay?" Defendants as a last resource seek shelter

1894.

JETHANBHAI
SIVJI
vs.
J. A. SHEP-
HERD.

(1) L. R. 6 C. P. 424.

1894.

JETHABHAI
SIVJI

vs.

J. A. SHEP-
HERD.

under the 7th condition on the back of the railway receipt. They argue that the Port Trust expenses are a charge on the "shipping line." The simple answer to this argument is that the Prince's Dock is no part of their line any more than they form part of the numerous shipping lines using them. Independently of these considerations, the defendants are estopped from averring a state of things contrary to their representations in their letter of 22nd December 1891 (Exhibit D.), that the rates given in Exhibit E. were in force on their line and were adopted by them in the through booking of goods (section 115 of Act I. of 1872). One more point remains to be decided. It was said the payments were not made under coercion or protest of any kind, and therefore no action will lie for their recovery. Upon mature consideration the Court is of opinion that they were not voluntary payments. There was no active opposition to them, because the charges were comparatively insignificant, but the plaintiffs' agent, Kavasji Pestonji, was thoroughly cognisant of their true character, having transacted this sort of business for many years. He made his objection to the clerk who issued the delivery orders and never relinquished his right to contest their legality. The claim must be adjudicated in the plaintiffs' favour either as money had and received by the defendants to the plaintiffs' use, or as damages resulting to them by a reason of the defendants putting a stop on the goods in breach of their agreement, whereby the plaintiffs were obliged to pay the terminal charges in order to redeem their property. I enter up judgment for the sum sued for and certify Rs. 85 as plaintiffs' advocate's costs.

The following was the judgment of the Chief Judge :

In this case I do not propose to recapitulate the facts which have been fully set out by the learned 4th Judge in his judgment on the case, and which are practically identical with the facts of the previous cases decided by myself and the learned 3rd Judge with regard to the Port Trust charges. I wish however before proceeding to discuss the question at issue to mention two points which seem to be of importance. In the first place the learned 4th Judge seems to have been to some extent influenced by a fact which he states, namely, that prior to December 1890 the British India Steam Navigation Company under their control landed goods at the Prince's Dock, themselves paying the Port Trust charges; from which he assumes that the defendants ought to do the same. This appears to me to be an erroneous assumption and one which must be carefully avoided. There is no evidence whatever in this case to show on what terms the British India Steam Navigation Company carried the goods, or what motives influenced them in consenting, as they no doubt did, to pay those charges. Of course evidence in the former cases is no evidence in the case, but I may mention on this point that it was proved before me in suit No. 12790 of 1892 that the rate charged by the British India Steam Navigation Company was, prior to September 1890, not 2 annas but 3 annas and 8 pies, that they reduced the rate during September, October, and November 1890 to 2 annas, and finding it impossible to carry on the contract profitably at that rate, they at the end of

November 1890 gave up the contract, when it was taken on by the defendants in this case. Of all this there is, I understand, no evidence in this case, and I only mention it as showing how dangerous it would be to assume that the British India Steam Navigation Company could and did work at the same rate at a profit, and that therefore as a matter of course and of necessity the defendants were bound to follow in their steps. Personally I am strongly of opinion that the conduct of the British India Steam Navigation Company has nothing whatever to do with the case. They might even have paid these charges, because they thought they were bound to pay, but that would in no way affect the position of the defendants when they adopted the opposite contention. One other matter I wish to mention. The learned 4th Judge has stated, and stated quite correctly, the exact nature of the services in respect of which these charges are made, "Unhooking the sling" &c. He proceeds to say that it is abundantly clear that the charge is essentially for the landing of the goods and delivering them to the owners. With this statement I regret that I cannot agree. I think that the actual landing, *i.e.* placing upon the quay, is in no way included in the services rendered. The actual landing is done by the ship's people and no charge is made therefor. This is important in considering the bearing of the agreement (Exhibits C. and No. IV.). The 3rd clause no doubt states that the rates include landing charges, and so, in my opinion, they do, inasmuch as the defendants do land these goods without further charges. The 14th clause says that the defendants shall deliver the goods to the consignees, but there is nothing there to show that such delivery must be made without further charge. I now proceed to consider shortly the point in question, and, as the learned 4th Judge has properly remarked, to decide that we must look at the contract between the parties. This is contained in the railway receipt, Exhibit No. I. If there is nothing in that contract to show that the plaintiffs are to bear these charges, then I think there can be little doubt that such charges must be borne by the defendants in their capacity of carriers. I stated my opinion as to this point in the former cases tried by me, and to that opinion I still adhere, though I admit that the matter is not wholly free from doubt. I think that the 7th clause of the conditions endorsed on the railway receipt meets this case. That provides that goods booked to Bombay or elsewhere by sea *via* Marmagoa are subject to rules and regulations, conditions of carriage, wharfage, and other charges in force on the railways and the shipping lines over and by which they are conveyed. The learned 4th Judge has very briefly dismissed this clause from consideration by saying that there can be no doubt that the Prince's Dock is no part of the defendant's shipping line. In one sense, of course, no dock or wharf can form part of a shipping line, which may be confined to the actual vessels employed, but that would be equivalent to saying that no wharfage could be charged in any case, which would be absurd. In my opinion it matters little that the wharf actually belongs to some one else if it is used by the vessels of the particular line. If the defendants owned these wharfs themselves, would not they be entitled to make reasonable charges for wharfage &c. for which the consignees would be liable under this clause? I think they would,

1894.

JETHABHAI
SIVJI
vs.
J. A. SHEP-
HERD.

1894.

JETHABHAI
SIVJI
vs.
J. A. SHEP-
HERD.

and I think they are entitled to levy these charges now in question under the same clause, although they use some one else's wharf for the purpose of landing the goods. There might be a question as to whether they were justified in doing so if they could land them as well and at less expense at some other place, but the plaintiffs do not sue in respect of such an undue overcharge, nor is there any suggestion that these Port Trust charges are in any way unreasonable or excessive. Under these circumstances I think that I cannot but adhere to the opinion expressed by me in suit No. 12790 of 1892. As the learned 4th Judge adheres to the opinion expressed in his judgment in this case, we shall submit a case for decision of the High Court upon this point. I regret that it has not long ago been finally decided by that tribunal, as it doubtless would have been decided but for the action of the plaintiffs in suit No. 12790 of 1892, and of the defendants in this case, in declining to have a case stated. The result of our differing in this Court is that my opinion must prevail, and that the suit stands dismissed. This, however, will be contingent on the opinion of the High Court. Question of costs reserved.

JUDGMENT OF THE HIGH COURT—(Sir C. Sargent, C.J., and
Farrao, J.)

We are of opinion that the defendants were entitled to demand the Port Trust wharfage charges amounting to Rs. 507-14-0 before delivering the goods to the plaintiffs. The question turns upon the contract between the parties for the carriage of the goods from Marmagoa to Bombay. It was admitted that the goods were received by the Southern Mahratta Railway Company on behalf of the company itself, the West of India Portuguese Railway Company, and the defendants' firm, and that the terms were to be found in the receipt passed by the Southern Mahratta Company at the time of consignment. Exhibit I, which is the receipt in question, shows that certain sums were to be paid to the two companies and the defendants respectively, and that notice by the writing on the back of the receipt was given to consignors, that goods booked to Bombay *via* Marmagoa were subject to the rules and regulations, conditions of carriage, wharfage, and other charges in force on the shipping lines by which they are conveyed. And the question therefore, which is one purely of fact, is whether the Port Trust wharfage charge in question was in force on the defendants' line of steamers between Marmagoa and Bombay at the time of the plaintiff's consignment. As to this it was found by the 4th Judge that the charge in question had been introduced into the delivery orders by the defendants

when they took over the business from their predecessors, and had been in force ever since that time, for a year preceding the plaintiff's first consignment. That being so, whatever objection might have been taken to the charge by the first consignor after the commencement of the business by the defendants, it is plain that the charge in question was in force when the plaintiffs consigned their goods, and that the plaintiffs' goods were therefore received, subject to the payment of the charge. The 4th Judge of the Small Cause Court considers this was not a charge in force on the defendants' shipping line because the Prince's Dock is no part of any shipping line, but he is mistaken as to the meaning of the condition, which is simply that the consignee is to pay such charges as are made on delivery of the goods by the steamers engaged in the carrying business which in this case was between Marmagoa and Bombay. We must therefore answer the question in the negative. Costs of reference to be costs in the case, to be taxed as on the Original Side of the High Court.

1894.

JETHABHAI
SIVJI
VS.
J. A. SHEP-
HERD.

MEGHJI ANANDJI, PLAINTIFF, versus NARUMAL TALAKCHAND,
DEFENDANT.

1894.

April 16,

Contract—Rules of the Bombay Cotton Exchange, Rule 25—Indian Contract Act (IX. of 1872), section 51—Plaintiff not ready and willing to perform cannot sue for damages.

In the case of a contract made subject to the rules of the Bombay Cotton Exchange, where the plaintiff (the purchaser) by a notice to the defendant sent on the morning of the due date dispensed with the delivery order prescribed by rule 25, and required delivery to be given by 2 P.M., but was not in point of fact in a position to perform the contract on his own part by paying for the cotton if delivered,

Held, that the original terms of the contract between the parties (including rule 25) were not in any way varied by the plaintiff's action in sending the notice; and that the case being one of simultaneous payment and delivery under section 51 of the Indian Contract Act (IX. of 1872,) and the plaintiff not being ready and willing to perform the contract on his part by paying for the goods, he could not recover damages on account of any breach on the defendant's part.

CASE stated for the opinion of the High Court under section 69 of the Presidency Small Cause Courts Act (XV. of 1862) by C. W. Chitty, Chief Judge.

1. This was a suit brought by the plaintiff to recover Rs. 874-2-0

B 1873—51

1894.

MEGHJI
ANANDJI
vs.
NARUMAL
TALAKCHAND.

as damages alleged to have been sustained by him in consequence of the defendant's failure to deliver to him 200 bales of new Broach-ginned good class cotton.

2. On the 11th December 1892 the defendant agreed to sell and the plaintiff agreed to purchase the said 200 bales at Rs. 245-12-0 per khandi, deliverable from 15th to 25th March 1893, subject to the rules of the Bombay Cotton Exchange.

3. As to the making of the contract the defendant raised no dispute, but he (1) denied breach of contract on his own part, (2) denied that the plaintiff was ready and willing to perform the contract on his part, and (3) disputed the damages.

4. As to the first defence it was practically admitted that the defendant had committed a breach of the contract. He admittedly sent no delivery order as required by rule 25 of the Bombay Cotton Exchange, nor had he any cotton, nor did he make any attempt to procure cotton to meet the contract on the due date. There was also no real dispute as to the quantum of damages, as the defendant in his evidence admitted that the rate at which the plaintiff claimed Rs. 255 was really lower than the market rate on the due date, which was about Rs. 257.

5. The main dispute in the case was as to the plaintiff's readiness and willingness to perform. The plaintiff's story was that early in the morning of the 25th March he had made an arrangement with a Márwári to supply him with the necessary funds for the purchase of 300 bales; that as the defendant did not send a delivery order as required by rule 25 before 12 o'clock on that day, he had gone at 12 o'clock to Colába and served the defendant with the notice; that he was accompanied on that occasion by Kanyalal, a solicitor's clerk, the Márwári, a broker Gangji, and his servant Bhanji; that money was actually tendered to the defendant in payment for the bales, but that the defendant went away; that all these persons remained there for three hours, when defendant came back and said he could not give the bales. It was admitted that no money was actually shown, but merely a bundle said by the Márwári to contain it.

6. I found as a fact that the plaintiff's story above set out was false, except that he did some time between 12 and 2 o'clock on the 25th March, in company with Kanyalal alone, serve the defendant

with the notice. I found that he had made no arrangement as alleged with the Márwari; that the Márwari never accompanied him to Colába; that the plaintiff in point of fact had no money to pay for these bales, and had no means of procuring it, and that he really never contemplated taking delivery, but thought that by serving the defendant with the notice he might be able to recover the alleged damages from him.

7. It will be seen from the notice that the plaintiff dispensed with the necessity of a delivery order being sent by the defendant as required by rule 25. I held that, the plaintiff having done so, the parties were relegated to the positions contemplated by section 51 of the Indian Contract Act, and that, as the plaintiff was not ready and willing to perform the contract on his part, he could not insist on performance by the defendant, nor sue him successfully for damages for non-performance. I accordingly dismissed the suit without costs, and as the plaintiff's pleader requested me to state a case for the opinion of the High Court, made my judgment contingent upon such opinion.

8. The following questions were suggested by the plaintiff's pleader:—(1) Whether by allowing the defendant till 2 P.M. on the due date to deliver the original terms of the contract (including rule 25) were in any way varied; (2) whether the Court was justified in holding that, although defendant had no cotton to deliver, and sent no delivery order, nor offered to give delivery at the *jutha*, the plaintiff ought to have had money ready at the *jutha* to pay for the 200 bales; (3) whether the plaintiff was bound in law to tender the value until delivery was offered; (4) whether the case is one of simultaneous payment and delivery under section 51, or of payment following delivery of goods under sections 52 to 54.

9. As to questions (2) and (3), I held that plaintiff must show himself to have been ready and willing to perform the contract on his part, *i.e.* to pay for the goods on delivery, the two actions being simultaneous. It was in my opinion unnecessary to hold, nor did I hold, that he was bound to have the money at the *jutha*, or to make tender before delivery. Questions (1) and (4) I submit for their Lordships' opinion.

10. The plaintiff has deposited in Court Rs. 50 to meet the costs of reference.

1894.

MEGHJI
ANANDJI

vs.

NARUMAL
TALAKCHAND.

1894.

JUDGMENT OF THE HIGH COURT.

MEGHJI
ANANDJI
vs.
NARUMAL
TALAKOHAND.

The first question must be answered in the negative and the fourth in the affirmative. Costs of reference to be costs in the case, to be taxed by the Taxing Officer of the High Court as of a suit on the Original Side.

1894.
June 26.

R. GILBERT AND OTHERS, PLAINTIFFS, versus SHAIK NUR CASSUM,
DEFENDANT.

MEHERALI MAHOMED PATELL, PLAINTIFF, versus SHAIK NUR
CASSUM, DEFENDANT.

*Civil Procedure Code (Act XIV. of 1882), section 284—Practice—Power
of Small Cause Court to attach and sell a debt of any amount.*

The practice which had obtained in the Court of Small Causes of attaching so much only of a debt as would *prima facie* appear sufficient to meet a decree, is not a practice which is good in law. The Court of Small Causes has the power to attach a debt irrespective of the amount, and also to order such debt to be sold, or to appoint a Receiver thereof.

CASE stated for the opinion of the High Court under section 69 of the Presidency Small Cause Courts Act (XV. of 1882) by C. W. Chitty, Chief Judge.

1. In suit No. 10642 of 1893, the plaintiffs obtained a decree against the defendant for Rs. 1,094-10-0 on the 28th of April 1893, and in suit No. 25526 of 1893 the plaintiff obtained a decree against the same defendant for Rs. 1,743-6-3 on the 13th October 1893.

2. In execution of the said decrees, attachments were levied in both suits by means of prohibitory orders, dated the 11th and 19th December 1893, respectively, on Shaik Abdul Guffur bin Shaik Juman. In each case the actual sum attached is the exact amount of the decree and costs, which is said to be a part of certain moneys in the hands of the garnishee. In the prohibitory order of the 11th December 1893 those moneys are said to be "about Rs. 18,000."

3. In pursuance of these prohibitory orders the usual garnishee notices were issued and made returnable on the 2nd February 1894. At the hearing of the notices the garnishee appeared by

his pleader, but did not admit that any moneys were due by him to the judgment-debtor. At the request of the plaintiffs I thereupon made an order for the sale of the property attached under section 284 of the Civil Procedure Code, the plaintiffs having liberty to bid at the sale. It was not at that time brought to my notice that the property attached was only a portion of the alleged debt.

4. The sale was fixed for the 7th March 1894, but the Registrar objecting to sell the whole debt, the matter was again referred to me, and I directed the sale to be postponed to enable the plaintiffs to make such further application in the matter as they might be advised.

5. The plaintiffs now, with the consent of the judgment-debtor, apply to have the whole debt sold by this Court on the grounds mentioned in their affidavits. (A copy of Mr. Gilbert's affidavit is sent here with.) I was, and still am, of opinion that I have no power under section 284 to order a sale of more than the property attached, that is to say, the respective portions of the debt, but as the matter is one of such importance and materially affects the long-standing practice of this Court, I readily consented to refer the questions arising for the opinion of their Lordships, reserving my judgment thereon meanwhile.

6. It has long been the practice of this Court, in cases where the debt alleged to be due to the execution-defendant exceeds the amount of the decree, to attach only so much of it as would *prima facie* be necessary to satisfy the decree. The reason for such a practice is obvious, as it would seem absurd to attach, say, a debt of Rs. 10,000 to satisfy a claim of Rs. 500, nor has this Court proper means for dealing with the very large balances which might be left in its hands if such a course were followed. The only difficulty that arises, or which might arise, is in cases where, the debt being denied by the garnishee, it becomes necessary for the Court to order the attached property to be sold (as in the cases now under consideration), or to appoint a Receiver to recover the amount. Then, I apprehend, it might be contended with some force that a sale cannot be properly made of more than the property attached, nor, on the other hand, of a portion of a debt, nor perhaps could a Receiver be properly

1894.

B. GILBERT

vs.

SHAIK NUR
CASSUM.

1894.

R. GILBERT
vs.
SHAIK NUR
CASSUM.

appointed for a portion of a debt. The further question would then arise as to whether this Court has power to attach a debt exceeding Rs. 2,000, but as to that there cannot, I think, be much doubt.

7. It should be mentioned that the plaintiffs applied in the first instance for attachment of the whole debt, but, following the practice above referred to, a portion only was attached. Fresh attachments could, if necessary and permissible by law, be issued against the whole debt.

8. The questions which I would now submit for the opinion of their Lordships are :

(1) Whether the practice of this Court of attaching so much only of a debt as would *prima facie* appear sufficient to meet a decree is a practice good in law ?

(2) If so, whether this Court can order the sale of a portion of a debt so attached, or appoint a Receiver thereof ?

(3) Whether this Court has power to attach a debt irrespective of the amount, or to order that such debt be sold, or to appoint a Receiver thereof ?

JUDGMENT OF THE HIGH COURT.

The first question must be answered in the negative and the third question in the affirmative. Costs of reference should be costs in the execution proceedings, to be taxed by the Taxing Officer of the High Court as of a suit on the Original Side.

KARA VUSONJI, PLAINTIFF, versus KAVASJI EDALJI AND ANOTHER, DEFENDANTS.

1894.
July 20.

Debt, assignment of—Consent of the debtor—Validity—Attachment—Payment into Court of moneys not actually attached—Discharge—Civil Procedure Code (Act XIV. of 1882), section 268.

Where there had been a complete assignment of a debt by the creditor to a third party, *Held* that the consent of the debtors was not a condition precedent to the validity of such assignment.

In a certain suit a sum of Rs. 670, part of a larger sum of Rs. 800, was attached by a prohibitory order addressed to M. On the garnishee notice coming on for hearing, the plaintiff and defendant being both present, C. (the first defendant in this suit) appeared and stated that he was the real garnishee, and that M. was only

his manager. The Judge did not amend the prohibitory order, but altered the garnishee notice by inserting the name of the garnishee as "C. by his manager M." Under the Judge's order, C. paid into Court the amount admitted by him as due to the defendant, viz. Rs. 515.

Held, that such payment was not a good discharge to C. in respect of the said amount, under section 268 of the Code of Civil Procedure (Act XIV. of 1882).

CASE stated for the opinion of the High Court under section 69 of the Presidency Small Cause Courts Act (XV. of 1882) by C. W. Chitty, Chief Judge.

1. In this suit the plaintiff's claim is, as assignee of one Khimji Lakhu, to recover from the defendants a sum of Rs. 1,177, alleged to be due by them to the said Khimji Lakhu.

2. The main question at issue in this case is as to the validity of the assignment under which the plaintiff claims. The execution of the document, which bears date the 6th September 1893, was admitted by the defendants, and it was accepted in evidence on payment of the deficiency of stamp duty and the requisite penalty.

3. It was argued on behalf of the plaintiff that the document in question was a valid assignment of the debt. His pleader at the same time admitted that the defendants never gave their express consent to the assignment though they did not actually deny their liability under it. They did not, in fact, reply at all to the plaintiff's notice.

4. On behalf of the defendants it was argued that the document was at least an appointment of the plaintiff as mukhtyár, or a power of attorney, which would enable him to sue for the debt in the name of Khimji Lakhu, that the transfer was incomplete, and that in any case it could not be operative as against the defendants, inasmuch as their consent had never been asked for or obtained.

5. A further defence was raised by the defendant's counsel that as to a portion of the amount claimed, Rs. 515-2-7, which he admitted to have been due by the defendants to Khima Lokhu, the defendants had paid this sum into Court in terms of a garnishee notice issued against them in suit No. 25931 to 1893, and that such payment was a complete discharge to them.

6. The circumstances of the payment into Court were as follows:—In suit No. 25931 of 1893 on the Board of the learned 5th Judge, in which Bala Bhaguji and others were plaintiffs and Khima Lakhu defendant, a prohibitory order was issued on the 21st of

1894.

KARA
VUSONJI
VS.
KAVASJI
EDALJI.

1894.

KARA
VUSONJI
vs.
KAVAFJI
EDALJI.

October 1893, addressed to Manekji Jijibhai Shroff (the second defendant in the present case), prohibiting him from paying to the defendant Khima Lakhu the sum of Rs. 670-12-6, part of a debt of Rs. 800, said to be due by him to the defendant. Subsequently on the 16th November 1893 a garnishee notice was issued to the said Manekji Jijibhai Shroff. On the 18th November 1893 Mr. Billimoria appeared for Messrs. Cursetji and Edulji Dubash (a firm in which the first defendant in the present case is, I believe, the sole partner), and explained that they were the real debtors and that Manekji Jijibhai was only their manager. The plaintiff was present and represented by a pleader and the defendant Khima Lakhu was also present. Under these circumstances the learned Judge said that the prohibitory order and notice might be amended. He accordingly thereupon amended the garnishee notice by inserting as the names of the garnishee "Messrs. Cursetji and Edulji Dubash, by their manager Manekji Jijibhai Shroff." By an oversight the learned Judge omitted to alter the prohibitory order, but he made an order on the garnishee to pay into Court the amount admitted by him, viz. Rs. 515. The garnishee, that is to say Messrs. Cursetji and Edulji Dubash, paid the moneys into Court on the same day, the 18th November 1893.

7. The question as to whether such payment was a discharge to the garnishees under section 268 of the Civil Procedure Code, came before the Full Court composed of the learned 4th Judge and myself, where, after consideration, we held that it was a good discharge, on the grounds that the omission to alter the prohibitory order was a mere clerical omission on the part of the learned 5th Judge, and that in effect a fresh prohibitory order and notice must be taken to have been issued and served on Messrs. Cursetji and Edulji Dubash in Court on the 18th November, to which the plaintiff and defendant in that case, No. 25931 of 1893, consented. As, however, the parties in this case are desirous of obtaining the opinion of the High Court on all the three questions at issue, I have now reserved my judgment pending the expression of such opinion.

8. The three questions for the consideration of their Lordships will be:

- (1) Whether the document, Exhibit A, is a complete assignment of the debt therein mentioned?

(2) Whether the consent of the debtors was a condition precedent to the validity of such assignment?

(3) Whether under the circumstances above set forth the payment of the sum of Rs. 515 into Court by the first defendant is a good discharge to him in respect of that amount?

9. Each party has deposited in Court Rs. 25 to meet the costs of reference.

JUDGMENT OF THE HIGH COURT.

The first question must be answered in the affirmative, and the second and third questions in the negative. The costs of reference to be costs in the case, to be taxed by the Taxing Officer of the High Court as of a suit on the Original Side.

GUNESHDA'S RAMNARAYEN AND ANOTHER, PLAINTIFFS, VERSUS
LUCKMINARAYEN AND ANOTHER, DEFENDANTS.*

1894.
June 26.

Hundi—Shahjog hundi endorsed to a particular person—Stolen hundi—Payment by drawee without enquiry to wrong person—Liability of drawee to lawful owner of hundi.

On the 8th December 1893, the plaintiffs at Sholapur having bought a *shahjog hundi* there, drawn upon the second defendant in Bombay, endorsed it to Ramrukh Ramkisson, and sent it by post to him for realization. In the course of transmission it was stolen, the name of Ramrukh expunged, and that of Dwarkadās Lalji substituted. On the 9th December 1893 the *hundi* was presented for payment to the second defendant in Bombay by a person giving his name as Dwarkadās Lalji, and the second defendant paid the amount without enquiry as to the respectability or position of the person to whom he paid. In a suit by the plaintiffs for the amount of the *hundi* and interest,

Held, (1) that the second defendant was guilty of conversion of the hundi, and was liable to the plaintiffs, the lawful owners thereof, in trover; (2) that the *hundi* continued to be *shahjog* after being endorsed to a particular person.

CASE stated for the opinion of the High Court under section 63 of the Presidency Small Cause Courts Act (XV. of 1882) by C. W. Chitty, Chief Judge.

1. This was a suit brought by the plaintiffs as the last *bond fide* holders for value of a *hundi* for Rs. 1,000, to recover that sum and interest from the defendants, who were the drawer and drawee of the said hundi.

* Reported at I. L. R. 18 Bom. 570.

1894.

GUNESH DÁS
RAMNARAYEN
vs.
LUCKMI-
NARAYEN,

2. On reading the plaint I was of opinion that there was no cause of action therein disclosed against the first defendant, the drawer of the *hundi*, and acting on the suggestion of the Court, the plaintiffs' attorney accordingly withdrew his claim as against the first defendant, and the suit proceeded against the drawee alone, who is hereafter called the defendant.

3. The facts of the case are fully set out in my judgment, a copy of which is hereto annexed, and to which for which brevity's sake I crave leave to refer.

4. I was of opinion on the evidence that there has been no such change in the custom of merchants with regard to paying *shahjog* hundis as the defendant alleged, but that the custom as stated in the case reported at 6 Bom. H. C. R. 24 still obtained and was in force, and that such a *hundi* was only payable to a person who was *shah*, of which fact it is necessary for the payee to satisfy himself before he can safely make payment.

5. I was of opinion that in this case the defendant having admittedly paid the amount of this *hundi* without any enquiry to a person who was not *shah*, and having received the *khoka* with an endorsement of payment, and having returned the same to the drawee, had been guilty of conversion of the said *hundi*, and was liable to the plaintiffs, the lawful owners thereof, in trover (see *Lovell vs. Martin*).⁽¹⁾

6. It did not, in my opinion, alter the character of the *hundi*, that it was endorsed for realization in favour of a particular individual. That fact could not, I thought, absolve the defendant of the duty which would otherwise lie upon him of making enquiries as to the respectability and position of the payee (see *Thakurlás vs. Futtehmull*).⁽²⁾

7. Under these circumstances I held that the defendant had converted the *hundi* to his use, for which act he was answerable to the plaintiffs. I therefore passed a decree against him for Rs. 1,010 (the amount of the said *hundi* and two months' interest at the rate of 6 *per cent. per annum*) and costs, and certified Rs. 135 as the professional costs of the plaintiffs' attorney. At the request of the defendant's pleader I made my judgment contingent on the opinion of the High Court.

(1) 4 Taunt. 792.

(2) 7 B L. R. 275.

8. The defendant's pleader formulated the following questions :

(1) Whether the circumstances of the case amount to a conversion of the *hundi* on the part of the defendant ?

(2) If yes, whether the defendant is liable to refund to the plaintiffs the amount of the *hundi* ?

(3). Whether, the *hundi* being payable by endorsement to Dwarkadás Lalji, the defendant is not discharged by such payment ?

(4) Whether the *hundi* continued to be a *shahjog hundi* after being endorsed to a particular person ?

(5) Whether the drawee's omission to detect the alteration is such negligence on his part as to render him liable to the plaintiffs ?

(6) Whether there was any privity of contract between plaintiffs, who were the payees of the *hundi*, and the defendant, the drawee, who had not accepted in their favour ?

9. The first question appeared to me to be a question rather of fact than of law, but otherwise unobjectionable. The second question depends on the answer given to the first.

To the third and fourth questions I have no objection.

The points raised by the fifth and sixth questions were not decided by me, as on the view which I took of the case, it appeared to be unnecessary. I apprehend therefore that their Lordships will not answer them unless their opinion on the point of conversion should be contrary to mine. In case that may be so, I should perhaps mention that, in my opinion, and as a point of fact, the defendant was negligent in not detecting the forged endorsement on the *hundi*, inasmuch as it is apparent on the most cursory glance that some name has been expunged, and the name of Dwarkadás Lalji written over it in a handwriting different to that of the rest of the endorsement.

10. With these remarks I leave the case in their Lordships' hands. The defendant has deposited in Court the amount of the decree and costs together with Rs. 50 to meet the costs of reference.

The judgment of the Chief Judge was as follows :

This is a suit brought by the plaintiffs as the last *bona fide* holders for value of a certain *hundi* for Rs. 1,000 to recover that sum and interest from the defendants, the drawer and drawee respectively of the said *hundi*. As on reading the plaint there appeared to be no immediate cause of action against the drawer, the claim as against him was withdrawn and the suit proceeded against the drawee

1894.

GUNESHDÁS
RAMNARAYEN
VS.
LUCKMI-
NARAYEN.

1894.

GUNESHDAŚ
RAMNARAYEN

vs.

LUCKMI-
NARAYEN.

alone, whom I will call the defendant. The facts are not in dispute. On 8th December 1893 the plaintiffs' firm at Sholapur bought a *shahjog hundi* at that place, and paid full value for the same. It was then endorsed in favour of Ramrukh Ramkisson, the plaintiffs' agent in Bombay, for realization, and on the same day sent to him by post. At the same time a post-card was sent advising the despatch of the *hundi*. Neither letter nor post-card arrived at their destination. Not hearing of their arrival the plaintiffs' firm sent a second post-card, in reply to which their agents stated that no *hundi* was received. The plaintiffs at Sholapur thereupon on the 14th December 1893 went to the drawer and demanded a *petha*. The drawee however having by that time received the *khoka* from the defendant declined to give a *petha*. The plaintiffs' man then came to Bombay to make enquiries. It then appeared that the *hundi* had been presented to the defendants on the 9th December 1893 by some person giving his name as Dwarkadās Lalji, and giving an address in Hanumān Gully, and that the defendant had sent the money there by his man, who had paid it to some one, whom he took to be the cashier of the said Dwarkadās Lalji. On the defendant's man going there again with the plaintiffs' man, no trace of any person known as Dwarkadās Lalji could be found, nor were his whereabouts discovered. It is quite clear that the *hundi* was stolen or intercepted during the transit and the name of Ramrukh Ramkisson expunged and that of Dwarkadās Lalji substituted. The defendant admittedly paid the amount of the *hundi* without enquiry as to the respectability or position of the person to whom he paid. With the exception that the *hundi* was a *shahjog hundi* bearing an endorsement in favour of a particular person, (as it now appears, a forged endorsement), the case is precisely similar in all respects to suit No. 13126 of 1893 decided by me on the 11th December 1893, and I shall not therefore repeat here the remarks which I made in that case, and which are without exception applicable here. Here, as in that case, it was alleged that there was no conversion, and that the custom of merchants had changed with respect to the necessity which previously existed of making due enquiries before payment of a *shahjog hundi*. The defendant has in this case entirely failed to prove any such change of custom. Indeed, the very reason given for such change, and for enquiries being no longer necessary, namely, that there is now too much business and too many merchants to allow of enquiries being made, is in itself the very strongest reason for making enquiries, if possible, of a more searching character. The defendant's witnesses were utterly unreliable. They evidently came to state exactly what they were asked by the defendant's pleader, and though one or two held positions of importance in respectable firms, their mode of giving their evidence deprived them of the respect to which their positions in such firms might otherwise have entitled them. I therefore have no hesitation in adhering to my former finding that the old established custom still prevails, and that a defendant cannot avoid liability in respect of a *shahjog hundi* which he has paid, unless he can show that he has paid it to *shah*. The only question is, whether in this case the *hundi* being specially endorsed makes any difference. No doubt the effect of the endorsement would be to restrict payment

to the endorsee, or some one claiming through him ; but this cannot, in my opinion, render the words *shahjog* nugatory, and I think payment could only be made to such endorsee after due enquiry to see whether or not he was *shah*. This view is borne out by the case of *Thakurdás vs. Puttehmull*,⁽¹⁾ and is also in accordance to a certain extent with the view taken by the defendant's own witnesses, who say they never look to the endorsement, but only to the body of the *hundi*. No authority has been quoted in support of the proposition that a *shahjog hundi* loses its character by being endorsed in favour of a particular person. As to whether the acts of the defendant amounted to a conversion of the *hundi* I think that there can be no doubt. By accepting it, paying the amount to a person not entitled to it, and receiving the *khoka* and forwarding it to the drawer, the defendant clearly converted the *hundi* to his own use and deprived the plaintiffs, the lawful owners of the *hundi*, of their rights in it. The plaintiffs can therefore sue him in trover. The charges of negligence on the part of the plaintiffs are unsupported by any evidence and must fail. In my opinion, the plaintiffs acted with all due diligence, and however soon they had communicated with the defendants, it would have been of no avail, as the *hundi* was paid on the 9th December 1893, the very next day after its despatch. In my opinion, also, the defendant is deserving of blame in not paying more attention to the endorsement on the *hundi*, a cursory glance at which would show it had been tampered with, something expunged, and the name of Dwarkadás Lalji written over. Under these circumstances I must pass a decree for the plaintiffs for Rs. 1,010 and costs and certify Rs. 135 as the professional costs of the plaintiffs' attorney. At the request of the defendant I make my judgment contingent on the opinion of the High Court. I have deemed it unnecessary under the circumstances to consider what, if any, were the contractual relations between the parties, or whether the plaintiffs would be entitled to proceed against the defendant under section 32 of the Negotiable Instruments Act.

Lang and *Scott* for defendant.

Inverarity for plaintiff.

JUDGMENT OF THE HIGH COURT (Bayley, C.J., and Farran, J.)

From the case stated by the Chief Judge of the Court of Small Causes, Bombay, it appears that on the 8th December 1893 the plaintiffs' firm at Sholápur having bought a *shahjog hundi* for Rs. 1,000 and paid full value for it, endorsed it in favour of Ramrukh Ramkisson, their agent in Bombay, for realization, and on the same day sent it to him by post. At the same-time a post-card was sent advising the despatch of the *hundi*. Neither letter nor post-card arrived at their destination. The *hundi* had been stolen or intercepted during the transit, the name of Ramrukh Ramkisson expunged and

1894.

GUNESH DÁS
RAMNARAYEN
vs.
LUCKMI-
NARAYEN.

(1) 7 B. L. R. 275.

1894.

GUNESH DÁS
RAMNARAYEN

vs.

LUCKMI-
NARAYEN.

that of Dwarkadás Lalji substituted. Not hearing of their arrival, the plaintiffs' firm sent a second post-card, in reply to which their agents stated that no *hundi* had been received. The plaintiffs at Sholápur therefore on the 14th December 1893 went to the drawer and demanded a *petha* (duplicate). The drawer, however, having by that time received the *khoka* (receipted *hundi*) from the defendant, declined to give a *petha*. The plaintiffs' man then came to Bombay to make enquiries, and it then appeared that the *hundi* had been presented to the defendants on the 9th December 1893 by some person giving his name as Dwarkadás Lalji, and giving an address in Hanumán Gully, and that defendant had sent the money there by his man, who paid it to some one whom he took to be the cashier of Dwarkadás Lalji. On defendant's man going there again with plaintiffs' man, no trace of any person known as Dwarkadás Lalji could be found nor were his whereabouts discovered.

The Chief Judge was of opinion that defendant having admittedly paid the amount of the *hundi* without any enquiry to a person who was not *shah*, and having received the *khoka* with an endorsement of payment, and having returned the same to the drawer, had been guilty of conversion of the *hundi* and was liable to the plaintiffs, the lawful owners thereof, in trover. He was also of opinion that it did not alter the character of the *hundi*, that it was endorsed for realization in favour of a particular individual, and that that fact could not absolve the defendant of the duty which would otherwise lie upon him of making enquiries as to the respectability and position of the payee.

The *hundi*, which is in the Márwádi language and character, is not made payable to any particular person by name, but according to the translation annexed to the proceedings states: "Immediately on the receipt of *hundi*, please pay the money in *hundi* currency to the *shah*."

Now, the meaning of *hundis* made payable to *shah*, and the usage in regard to such documents among native merchants on this side of India, was very fully considered in a case which came before Sir Joseph Arnould in 1869, in which a large body of evidence was given on the subject—*Dowlutram vs. Bulakhidas*,⁽¹⁾ and as section 1

(1) 6 Bom. H. C. R. 24.

of "The Negotiable Instruments Act, 1881" (Act XXVI. of 1881), states that nothing in that Act contained, affects any local usage relating to any instrument in an oriental language, unless such usages are excluded by any words in the body of the instrument which indicate an intention that the legal relations of parties thereto shall be governed by that Act, and no such words are to be found in the *hundi* in question, the usage proved, as well as the decision in that case, afford a guide which this Court can avail itself of in the determination of the points submitted for our consideration by the Chief Judge of the Small Cause Court.

In his very able judgment in that case, Sir Joseph Arnould said (page 25) that "*hundis* made payable to *shah*, *shahjogi*, differ from bills of exchange in one very material circumstance, amongst others, that as a general rule the acceptance of the drawee is not written across them, so as thereby to give them an additional degree of mercantile credit, and to that extent make it just to impose an additional degree of liability on the acceptor," and "that as a general rule *hundis* are very frequently not presented for acceptance before they are presented for payment, before, that is, they are either due or overdue." "It is also stated," said the learned Judge, "that the name of the *shah* or person who has bought or holds the *hundi* must always be endorsed on it before it is presented." At page 27 he says: "It will be convenient to advert to those points in which both parties substantially agree. And first as to the very important point of the meaning attached in the Hindu mercantile world to the formula, 'Payable to *shah*.' Now the result of the evidence on both sides as to this point, supported by the learned etymological evidence of Mr. Balaji Pandurang, is clearly this, that *shah* means a responsible and respectable person, a man of worth and substance known in the bazar. A *hundi* payable to *shah* is paid on the responsibility of the *shah*. If he be not known to the drawee, enquiry is to be made about him, and the amount of the *hundi* is not paid till that enquiry is satisfactorily answered, or till some one known to the drawee is found to identify him, or speak to his responsibility."

The defendant was well aware of the circumstance of this usage, as it was alleged on his behalf at the hearing that the custom of merchants had changed with respect to the necessity which previously existed of making due enquiries before payment of a *shah*-

1894.

GUNESHDÁS
RAMNARAYEN
vs.
LUGEMI-
NARAYEN.

1894.

GUNESHDÁS
RAMNARAYAN
vs.
LUCKMI-
NARAYEN.

jog hundi. But the Chief Judge states that the defendant had entirely failed to prove any such change of custom, and that his witnesses called for that purpose were utterly unreliable.

The Advocate General, who appeared for the defendant in the argument in this Court, relied upon a dictum of Sir Barnes Peacock, C.J., reported in 7 B. L. R. 289, note 3, to the effect that the *hundi* in that case would pass at any rate prior to acceptance by delivery. The *hundi* there was drawn in Bombay on a firm in Calcutta and was payable 51 days after date in favour of Sewdás Damoni. The case was decided in 1865, four years before the decision of Sir Joseph Arnould, and it is difficult from the report to discover whether the *hundi* there was or was not a *shahjogi hundi*. The words *shahjogi* or *shah* do not occur anywhere in the report, and if the *hundi* in that case was not a *shahjogi* one, the expression of opinion of Sir Barnes Peacock would be extra-judicial and of no binding authority.

In a case which came before the Appellate Court at Calcutta in 1871, *Thakurdás vs. Futtehmull*,⁽¹⁾ the dictum of Sir Barnes Peacock, C.J., was relied on on behalf of the defendant, but the Court said that it was not clear how that expression of opinion was pertinent to the case before the Court and that it supposed that the Court never meant to lay down that under Hindu law every one who took the *hundi*, even though he obtained it by fraud, would be treated as a *shahjog*. The Judges said (p. 302), "Then who answers to the term *shahjog* unless it be the person designated by real (not fictitious) endorsement? And when a Hindu maker or rightful owner of a *hundi* payable in terms to the *shahjog* endorses it as sold or sent to A., he obviously means to pass the right of dealing with the *hundi* to A. alone" (p. 303). "I certainly am not aware" (said Phear, J., in delivering the judgment of the Court) "of any rule of Hindu law, customary or otherwise, which would have the effect of making the word *shahjog* mean payable to bearer, quite independently of the endorsement" (p. 304).

Reliance was also placed on behalf of the defendant on section 85 of the Negotiable Instruments Act, 1881. That section says: "Where a cheque payable to order purports to be endorsed by or on behalf of the payee, the drawee is discharged by payment in due

(1) 7 B. L. R. 275.

course." Assuming that that section might be applicable to a *Márwádi hundi*, the *hundi* in the present case, we may remark, is not a cheque, and is not payable to order, but to the *shah*. By section 6 a cheque is defined to be a bill of exchange drawn on a specific banker; a bill of exchange is, by section 5, stated to be an instrument directing a certain person to pay a certain sum to or to the order of a certain person, or to the bearer of the instrument; whereas this *hundi* is payable to the *shah*, and, as already noticed, Sir Joseph Arnould points out how bills of exchange differ from *hundis* like the one now in question. Then by section 85 the drawee is discharged only "by payment in due course"; and by section 10 "payment in due course means payment without negligence to any person in possession thereof under circumstances which do not afford a reasonable ground for believing that he is not entitled to receive payment of the amount therein mentioned."

In the present case payment to Dwarkadás Lalji was not a "payment in due course," as the defendant was bound by the custom of Hindu merchants to make enquiries as to the person who presented the *hundi* to him for payment, and the Chief Judge has found that the defendant admittedly paid the amount of the *hundi* without enquiring as to the respectability or position of the person to whom he paid, and moreover he found as a fact that the defendant was negligent in not detecting the forged endorsement on the *hundi*, inasmuch as it was apparent on the most cursory glance that some name had been expunged, and the name of Dwarkadás Lalji written over it in a handwriting different to that of the rest of the endorsement. He also found that the defendant's own witnesses said that they never looked to the endorsement but only to the body of the *hundi*. The Chief Judge added that no authority had been quoted to him, nor was any cited in support of the proposition that a *shah-jogi hundi* loses its character as such by being endorsed in favour of a particular person. We think that the Chief Judge was justified in holding upon the authority of *Lovell vs. Martins*⁽¹⁾ that the defendants had been guilty of conversion of the *hundi* and were liable to the plaintiffs, the lawful owners thereof, in trover.

A similar point was decided in April 1894 in England. The payee of a crossed cheque specially endorsed it to the plaintiffs and

1894.
GUNESHDÁS
RAMNABAYEN
vs.
LUCKMI-
NARAYEN.

(1) 4 Taunt. 799.

1894.

GUNESIDÁS
RAMNARAYEN
vs.
LUCKMI-
NARAYEN.

posted it to them. A stranger having obtained possession of the cheque during the course of transmission obliterated the endorsement to the plaintiffs and having substituted a special endorsement to himself presented it at the defendants' bank and requested them to collect it for him. They did so, and handed the money over to him. In an action brought by the plaintiffs for conversion, it was held that the defendants were liable for the amount of the cheque—*Kleinwort Sons and Company vs. Comptoir National D'Escompte de Paris.*⁽¹⁾ We therefore agree with the view taken by the Chief Judge and answer the questions which he has submitted to this Court, thus :

We hold (1) that the circumstances of the case amount to a conversion of the *hundi* on the part of the defendant.

(2) That the defendant is liable to refund to the plaintiffs the amount of the *hundi*.

(3) That, the *hundi* being payable by endorsement to Dwarka-dās Lalji, the defendant is not discharged by such payment.

(4) That the *hundi* continued to be a *shahjogi hundi* after being endorsed to a particular person.

It is unnecessary to return any answers to the 5th and 6th questions.

The costs of this reference will be costs in the case, to be taxed on the Original Side of this Court.

1894.

Aug. 20.

RAMSAHIMUL HUKMCHAND AND ANOTHER, PLAINTIFFS, versus
KESUBDEV MULCHAND AND ANOTHER, DEFENDANTS.

Contract—Action on settled contracts maintainable without express agreement of settlement.

Where the defendants by three separate contracts purchased cotton from the plaintiffs and by three other separate contracts re-sold the same cotton to the plaintiffs at lower prices,

Held, that a suit would lie for the differences on such settled contracts without any express agreement of settlement.

CASE stated for the opinion of the High Court under section 69 of the Presidency Small Cause Courts Act (XV. of 1882), by C. W. Chitty, Chief Judge.

(1) (1894) 2 Q. B. 157.

1894.

RAMSAHIMUL
HUKMCHAND
vs.
KESUBDEV
MULCHAND.

1. In this suit the plaintiffs claimed to recover from the defendants a sum of Rs. 850-8, being the amount of difference on six settled contracts for the purchase and sale of 300 bales of Bengal fully good cotton.

2. There was no dispute about the facts. On 19th December 1893 the defendants agreed to purchase from the plaintiffs 200 bales of Bengal fully good cotton at Rs. 167 per *khandi*, deliverable 15th to 25th March 1894, by two contracts. On the 2nd January 1894 the defendants re-sold the same 200 bales to the plaintiffs at Rs. 163 per *khandi* by two contracts. On 18th January 1894 the defendants agreed to purchase from the plaintiffs 100 bales of the same class of cotton for the same *vaida* at Rs. 167-8 per *khandi*, and on the 11th March re-sold the same to the plaintiffs at Rs. 157-8 per *khandi*. All six contracts were made through the same broker.

3. The defendants having settled the three contracts for purchase made by them, the plaintiffs took no further steps, but after the due date (25th March) demanded payment of the difference. The defendants' *munim* said he had no money to pay and asked them to receive a *hundi* payable at 61 days' sight. He subsequently offered to give the plaintiffs a transfer on one Tulsiram Musudilal, but that arrangement fell through owing to the defendants' *munim* having already given the transfer to another creditor.

4. The defendants did not venture to go into the box to deny that these contracts were settled as alleged by the plaintiffs, and I had no hesitation in finding on the uncontradicted statement of the plaintiff that the cotton was actually re-sold by the defendants before the due date, and it appeared to me that the presumption in that case would be that the defendants re-sold in order to avoid the necessity of taking or giving delivery or of doing anything further than paying the difference.

5. It was contended for the defendants that no cause of action was disclosed and that no suit would lie for differences on alleged settled contracts for the sale and purchase of cotton, and that there must be an express agreement of settlement.

6. It seemed to me that the facts clearly showed the intention of the parties to settle the contracts and that their subsequent conduct showed that they regarded the contracts as settled and nothing remained to be done except that the defendants should pay the

1894.

KAMSAHIMUL
HUKMCHAND
vs.
KESUBDEV
MULCHAND.

amount of the differences. I therefore passed a decree for the plaintiffs for Rs. 850-8 and costs and certified Rs. 85 as their professional costs.

7. At the request of the defendants' pleader, I made my judgment contingent on the opinion of the High Court on the question as to whether such a suit would lie. The answer appears obvious, but as it is a question of law arising in the case, I conclude that I am bound to state the case as requested.

8. The defendants have deposited in Court the amount of the decree and costs and Rs. 50 to meet the costs of reference.

JUDGMENT OF THE HIGH COURT.

The question must be answered in the affirmative, viz. that a suit would lie. Costs of reference to be costs in the case, to be taxed by the Taxing Officer of the High Court as of a suit on the Original Side.

JAISING HATHISING, PLAINTIFF, versus BHOLANATH REVASHUNKER, DEFENDANT.

1894.
Sept. 21.

Execution—Attachment—Power of Small Cause Court to attach and sell the right, title, and interest of a judgment-debtor to and in shares in a public company standing in his name and that of a third party—Mode of dealing with such property when sold—Civil Procedure Code (Act XIV. of 1882) section 303.

In execution of a decree against a sole defendant the Court of Small Causes has power to attach and sell the right, title, and interest of the judgment-debtor to and in shares in a public company standing in the names of him and his brother.

The procedure to be followed in order to vest such property when sold in the purchaser is that prescribed by section 303 of the Code of Civil Procedure (Act XIV. of 1882).

CASE stated for the opinion of the High Court under section 617 of the Code of Civil Procedure (Act XIV. of 1882) by C. W. Chitty, Chief Judge.

1. This suit was originally filed in the Court of the Subordinate Judge at Ahmedabad, and a decree passed in favour of the plaintiff for Rs. 1,336-7 on the 8th January 1892.

2. On the 28th October 1892 the said decree was transferred to this Court for execution, and in execution of such decree on the 9th December 1892, two shares, Nos. 837 and 796, of the Morarji

Goculdas Spinning and Weaving Company, Limited, standing in the names of the defendant and his brother Chimanlal Revashunker, were attached by prohibitory order. The market value of the said shares then was and still is about Rs. 1,800 each.

3. On 22nd February 1894 a garnishee notice was served on the manager of the said company, in pursuance of which on the 2nd May 1894 the garnishees put in an appearance and stated that the shares were not in the possession of the company. It was stated that the share certificates were with the judgment-debtor Bholanath Revashunker. Chimanlal Revashunker also appeared on that day, and claimed the shares. He was directed to file a claim.

4. The said claim came on for hearing on the 8th June 1894, when after investigation I ordered that the attachment should be raised except so far as the same was levied on the right, title, and interest of the judgment-debtor to and in the said shares.

5. On the 10th July 1894 I made an order for sale of the right, title, and interest of the judgment-debtor to and in the said shares. The order by an error directs the sale of the two shares, but the property actually put up for sale, and sold, was the right, title, and interest aforesaid. The sale was once adjourned by order of the Court, and ultimately took place on the 2nd August 1894, when one Bhikabhai Mohunlal became the purchaser for a sum of Rs. 1,560, which is now deposited in Court.

6. As, however, there appears to be some doubt as to whether the action of this Court, first, in levying the attachment as above stated, and, secondly, in selling the right, title, and interest of the judgment-debtor as aforesaid, was valid, and, if it was valid, as to what procedure should now be followed, I have stayed execution in the case during the submission of this reference to the High Court.

7. The questions I would submit for their Lordships' opinion are :

(1) Whether in execution of a decree against one defendant, this Court had power to attach the right, title, and interest of the judgment-debtor to and in shares in a public company standing in the names of him and his brother ?

(2) If so, whether this Court had power to sell such right, title, and interest ?

1894.

JAINING
HATHISING
VS.
BHOLANATH
REVA-
SHUNKER.

1894.

JASING
HATHISING
vs.
BHOLANATH
BEVA-
SHUNKER.

(3) If so, what procedure should now be followed in order to vest such property sold in the purchaser ?

8. As to my own opinion in the matter I may say that I have considerable doubt, but saw and now see nothing to prevent this Court from issuing the attachment and selling the property attached in the manner above stated. As to the procedure now to be followed, it would seem that sections 301 and 302 of the Civil Procedure Code are inapplicable to a case where the whole share is or are not sold ; and that the order to be now passed is a order of vesting under section 303, the purchaser being left to his remedies by suit or otherwise to enforce possession of the property purchased. As this case is submitted by the Court of its own motion, no deposit has been made by the parties concerned.

JUDGMENT OF THE HIGH COURT.

The first and second questions should be answered in the affirmative, and the third, that the procedure should be followed as in section 303 of the Code provided.

1894.
Sept. 21.

BALARAM HARICHAND AND OTHERS, PLAINTIFFS, versus THE
SOUTHERN MAHRATTA RAILWAY COMPANY, DEFENDANTS.*

*Railway Administration—Liability for loss of goods—Indian Railways Act
(IX. of 1890), section 75.*

The words "loss, deterioration, or destruction of the parcel," contained in section 75 of the Indian Railways Act (IX. of 1890), include loss caused by the criminal misappropriation of a parcel by a servant of the railway administration in charge thereof.

Under section 75 of that Act it is necessary that both value and contents of a parcel (if over Rs. 100 in value) should be declared, before the railway administration can be held liable in respect thereof.

A consignor of silver coin does not satisfy the requirements of section 75 by paying for the parcel the special rate required by clause 50 of the defendant-company's rules to be paid for the carriage of treasure &c.

CASE stated for the opinion of the High Court under section 63 of the Presidency Small Cause Courts Act (XV. of 1882) by C. W. Chitty, Chief Judge.

* Reported at I. L. R. 19 B. 151.

1894.

BALARAM
HARICHAND
vs.
S. M. RAILWAY
COMPANY.

1. This was a suit brought by the plaintiffs to recover from the defendant-company a sum of Rs. 672-14-6, being the value of a parcel of Rs. 700 in cash consigned by the plaintiffs from Sāngli to Bombay, which the defendant-company failed to deliver, less a sum of Rs. 27-1-6 paid to the plaintiffs in respect thereof by the Police Superintendent of the defendant-company.

2. The facts of the case, together with the reasons for my decision, are fully set out in my judgment delivered on the 4th July 1894, of which a copy is hereto annexed, and to which for brevity's sake I crave leave to refer.

3. The questions of law which I beg to submit for their Lordships' consideration are as follows :

(1) Whether the words "loss, deterioration, or destruction of the parcel," contained in section 75 of the Indian Railways Act, 1890, include loss caused by the criminal misappropriation of the parcel by a servant of the railway administration in charge thereof?

(2) Whether under section 75 it is necessary that both value and contents of a parcel (if over Rs. 100 in value) should be declared before the railway administration can be held liable in respect thereof?

(3) Whether the plaintiffs have satisfied the requirements of section 75 by paying for the parcel in question the special rate required by clause 50 of the defendant-company's rules to be paid for the carriage of treasure &c.?

(4) Whether the percentage or the value mentioned in section 75, which the consignor is, if required by the administration, to pay or engage to pay by way of compensation for increased risk, is equivalent to insurance as prescribed by the company's byelaws and rules?

4. The suit was dismissed by me subject to the opinion of their Lordships on the above questions. The plaintiff has deposited in Court the professional costs Rs. 51 awarded against him, together with Rs. 50 to meet the costs of reference.

Clauses 50 and 54 of the defendant-company's rules relating to the carriage of specie and insurance were as follow :

50. *Specie*.—(a) Treasure including specie, bullion, gold and silver coin, jewellery, trinkets, plate, &c., shall be carried at the following rates, viz. :

1894.					Pies per Maund per Mile.
BALARAM	Up to 27 maunds	...	...	...	2½
HARICHAND	Above 27 „ and up to 81 maunds	...	...	...	2
rs.	„ 81 „ „ 270 „	...	...	...	1½
S. M. RAILWAY	„ 270 „ „ „	...	...	...	1
COMPANY.					

Provided that the charge for any quantity shall not be less than that for a smaller quantity according to the above scale.

Insurance Rates.

54. *Goods or Parcels.*—(a) The rate for insurance of goods, parcels, &c., shall be as follows: Gold, silver, and other excepted articles—2 annas per 100 miles or fraction of 100 miles, subject to a maximum of one per cent.

(b) The insurance shall in no case be less than two rupees for the whole distance.

The judgment of the Chief Judge was as follows :

This is a suit brought by the plaintiffs to recover from the defendant-company a sum of Rs. 672-14 6, the value of a parcel containing Rs. 700 consigned from Sāngli to Bombay by the last plaintiff Ramchandra Dayaram, which parcel the defendant-company failed to deliver, but on account of which they have paid to the plaintiffs Rs. 27-1-6. This is a case of some importance so far as it deals with the responsibility of a railway administration under the Indian Railways Act, 1890. The facts, except as to what took place with regard to the declaration of the parcel, are not in dispute. On the 9th June 1891 the plaintiff Ramchandra Dayaram wished to consign a parcel of Rs. 700 from Sāngli (where his firm is carried on in the name of Raghunath Ramchandra) to Bombay. He accordingly sent the box containing the rupees by his man Ganu Rendala to one Ramchandra Ganesh at Sāngli Station. It appears that Ramchandra Ganesh is a mukādam and does consignment business. Ramchandra Ganesh tendered the parcel to the assistant station-master, who asked him what it contained, to which he replied rupees in cash. Ramchandra Ganesh also stated before me that he had told the station-master the amount. This was not till he had been recalled and the question put to him by the Court. On consideration of the whole evidence, I am inclined to think that nothing at all was said as to the value of the parcel, that no question was asked by the assistant station-master as to that, but that he merely enquired the contents, and made out the various documents as on a parcel of silver coin weighing 10 seers. The charge made was 15 annas in accordance with the rates prescribed for treasure, which charge was paid by Ramchandra Ganesh. The assistant station-master, it is true, states that he asked Ramchandra what was the value of the parcel, and that Ramchandra replied that he did not know. I do not feel disposed to accept this statement as accurate. It is improbable that the assistant station-master would recollect exactly what was said more than three years ago. I think it more probable that it never occurred to either the assistant station-master or Ramchandra to think of the value, and that the parcel was despatched in what

appears to have been the usual way, namely, on payment of the higher rates required for treasure, but without insurance. The parcel was duly handed to the guard of the train by name Belcher. On arrival of the train at Poona no such parcel was delivered by the guard, and of course it never reached its destination at Bombay. Some days later in consequence of its non-arrival enquiries were made, and it ultimately appeared that the parcel had been stolen by Belcher. He was subsequently put on his trial in respect of the theft, to which he pleaded guilty, and was sentenced to a term of imprisonment which he is still undergoing. The Police Superintendent of the defendant-company has returned to the plaintiffs a sum of Rs. 27-1-6, the proceeds of sale of Belcher's effects. It was admitted by the plaintiffs' pleader that the plaintiffs considered that they had no remedy against the defendant-company, but in consequence of the decision of Starling, J., reported at I. L. R. 17 Bom. 723, he was induced to file this suit. The defendant-company raised three defences: (1) that the goods not having been properly declared, the company are not liable under section 75 of the Indian Railways Act, 1890; (2) that if the goods were so declared the company took such care of the same as was required by sections 151 and 152 of the Indian Contract Act; (3) that the parcel did not contain Rs. 700. As to the third defence, the statement of Ramchandra Dayaram that he saw Rs. 700 put into the box and sent it to the station, stands uncontradicted, and I see no reason for supposing that the parcel did not contain the number of rupees alleged. As to the second defence I think that there can be no doubt whatever that the defendant-company have not discharged the onus which lay upon them of showing that they had fulfilled the duties of a bailee as laid down in section 151 of the Indian Contract Act. So far from proving that, they have, by the admissions of their own witness, Mr. Lindsay, who gave his evidence most fairly and candidly, shown that they acted in this matter as, in my opinion, no prudent man could possibly have acted. In the first place they engaged their guard Belcher and put him in a position of trust without making any enquiries as to his character and antecedents. Enquiries were then instituted, and although they almost immediately found therefrom that he had been dismissed from the employ of the Indian Midland Railway Company for criminal breach of trust for which he had suffered six months' imprisonment; though they found that subsequently he had left his employment under the Bengal-Nagpur Railway Company under circumstances which, to say the least, imputed to him serious neglect of duty, they nevertheless kept him on, and allowed him to remain in a position where the highest integrity was necessary. The only reason for so doing seems to be that they were much in need of guards, and thought that Belcher might be able to clear his character. As these facts were known to the defendant-company in May 1891, and the theft occurred in June, I am strongly of opinion, that in this case the defendant-company cannot shelter themselves under the provisions of the Indian Contract Act by saying they have acted in this case as a prudent man would have acted.

I now come to the consideration of the first issue. This turns on the inter-

1894.

BALARAM
HARICHAND
VS.
S. M. RAILWAY
COMPANY.

1894.

BALARAM
HARICHAND
vs.
S. M. RAILWAY
COMPANY.

pretation of section 75 of the Indian Railways Act, 1890. I may, however, first deal with the argument of plaintiffs' pleader, that that section cannot absolve the defendant-company where the loss, destruction, or deterioration has been caused by the criminal act of one of its own servants. It is certainly noteworthy that the words "in any case" which occurred in the corresponding section of the Act of 1854, and which were the subject of judicial interpretation in *Venkatachala vs. South Indian Railway Company*,⁽¹⁾ do not occur in this section, but then again there seems to be nothing in the Act, as it at present stands, to except the case of the loss &c. occurring in consequence of the negligence or misconduct of the company's servants, and to say that in such cases responsibility shall attach. I think, therefore, the section must be taken to cover all cases of loss, destruction, or deterioration of parcels under whatever circumstances. Nor I think can much importance be attached to the argument of Mr. Manchashanker, that there was no loss of the parcel in this case. It was lost to the defendant-company and to the plaintiffs, and I do not think it can be said not to be so lost because an employé of the company made away with it. Then I come to the final question whether these goods were properly declared. Having regard to the evidence, I am unable to find that they were so declared. The section distinctly states that the person delivering the package to the administration must cause the "*value and contents*" to be declared or declare them. Now here no value was declared. The declaration of the value has become a far more important incident under this new Act, inasmuch as the consignor must give the administration the opportunity of claiming a percentage on the value declared by way of compensation for increased risk. Unless the value be declared the percentage cannot be ascertained or asked for. I think, therefore, that the declaration of the value must be regarded as a condition precedent to the attaching of the responsibility of the defendant-company. I do not think that it would be obligatory on the defendant-company to enquire what the value was. This must, it appears, be declared by the sender. In this respect the wording of the Act has been changed, and it seems to me that this case is so far distinguishable from that decided by Starling, J. I do not think that under this section it is enough to declare the contents and pay the higher rates as laid down for treasure. The administration must also have the opportunity of demanding a percentage. It is not for me here to rule on the rights of the defendant-company to fix the rates or make bye-laws, but I may mention that bye-law 26, which purports to be an abstract of the Indian Railways Act, 1890, section 75, gives anything but a correct view of the provisions of that section and the degree of responsibility or exemption from responsibility attaching to the company under it. As I said I regret to have to come to this conclusion, as it seems to me to be a case where the defendant-company ought, if possible, to be made responsible. As both parties wish the case to go to the High Court, I make my judgment contingent on the opinion of their Lordships. That judgment is that the suit be dismissed, and Rs. 51 certified as costs of the defendant-company's attorney.

(1) I. L. R. 5 M. 208.

Lang (Advocate General) for plaintiffs.

Inverarity for defendants

The following cases were cited:—*Hearn vs. London and South Western Railway Company*⁽¹⁾; *Skipwith vs. The Great Western Railway Company*⁽²⁾; *Secretary of State for India vs. Budhu Nath*⁽³⁾; *Venkatachala vs. South Indian Railway Company*⁽⁴⁾; *Raisett vs. G. I. P. Railway Company*⁽⁵⁾; *Robinson vs. South Western Railway Company*⁽⁶⁾; *Illoor Kristinah vs. G. I. P. Railway Company*.⁽⁷⁾

1894.
BALARAM
HARICHAND
VS.
S. M. RAILWAY
COMPANY.

JUDGMENT OF THE HIGH COURT (Bayley, C.J., and Farran, J.).

The first and second questions must be answered in the affirmative and the third in the negative. It is not necessary to answer the fourth question.

NARSU KONARI AND ANOTHER, PLAINTIFFS, versus LINGUJI
MANKUJI, DEFENDANT.

1895.
Jan. 29.

Bond for repayment of caste moneys passed to plaintiffs—Right of plaintiffs to sue on the bond—Stipulation for repayment “when the caste shall demand”—Condition precedent—Demand may be by suit—Demand by majority sufficient.

The plaintiffs and defendant were all members of the Vanjari Kamáthi caste. The defendant held moneys belonging to the caste, which had been entrusted to him for caste purposes. In respect of such moneys he passed a bond to the plaintiffs, promising (*inter alia*) to repay such moneys “when the caste shall demand.” In a suit by the plaintiffs on the bond,

Held, (1) that the plaintiffs as nominees of the caste had a right of action on the bond: (2) that the condition in the bond that the money is payable “when the caste shall demand” it, was a condition precedent to recovery by the plaintiffs, but that the demand made by the suit was sufficient, provided it was brought with the sanction and authority of the caste: and (3) that a demand by the majority of the caste was sufficient, if their wish had been ascertained by resolutions at a duly convened meeting of the caste.

CASE stated for the opinion of the High Court under section 69 of the Presidency Small Cause Courts Act (XV. of 1882) by C. W. Chitty, Chief Judge.

(1) L. R. 10 Exch. 703. (2) 4 Times' Law. Rep. 529. (3) I. L. R. 19 C. 538.

(4) I. L. R. 5 M. 208. (5) I. L. R. 17 B. 723. (6) 34 L. J. C. P. 234.

(7) I. L. R. 2 M. 319.

1895.

NARSU
KONARI
vs.
LINGUJI
MANKUJI.

1. This was a suit by the plaintiffs to recover a sum of Rs. 798-7-5, the amount of principal and interest alleged to be due on a bond dated the 2nd May 1893, and passed by the defendant to the plaintiffs.

2. The bond was admitted by the defendant, and also the receipt of the money. It was however contended on his behalf, (1) that the plaintiffs had no right of action on the bond, and (2) that the condition for payment prescribed in the bond, namely that it should become payable "when the caste shall demand," had not been fulfilled.

3. The plaintiffs and defendant are all members of the Vunjári-Kámáthi caste, a caste which numbers some 300 persons. It was stated, apparently without contradiction, that the moneys in the defendant's hands were not a loan to him, but moneys belonging to the caste which had been entrusted to him for caste purposes. It was argued for the defendant that the moneys being caste moneys the plaintiffs could not sue to recover them. I held, however, that the bond being passed to the plaintiffs, and their names alone being contained therein as payees, they and they alone could maintain the action, whether the moneys were to be paid to them on their personal account or as trustees or nominees of the caste.

4. As to the second defence it appeared from the statements of the solicitors for the parties that there had been no demand on the part of the caste. It appeared that there are two factions in the caste, one in favour of the recovery of the money by the plaintiffs, the other in favour of its being left in the defendant's hands. It was stated that a caste meeting was called on the 25th June last (before suit filed) when only some forty or fifty persons, all of the faction favouring the plaintiffs, were present, when it was resolved that the moneys should be recovered. This meeting was denied by the defendant, but in any case it was not suggested that any demand was made in accordance with the opinion expressed at such meeting.

5. It was argued on behalf of the plaintiffs that a demand by the majority of the caste would be sufficient; that if it were not, there could never be a legal demand, inasmuch as there would be at least one member opposed to it, *i.e.* the defendant himself. There

is however nothing in the bond itself to justify the view that a demand by the majority would be sufficient, though a custom might be possibly proved that action by the caste meant action by the majority.

6. It was not in my opinion necessary to determine this point, as it appeared that there had been no demand, whether of the caste as a whole, or of the majority of the caste. I therefore decided that the suit must fail, but at the request of the plaintiffs' solicitor made my judgment contingent on their Lordships' opinion on the following points :

(1) Whether the plaintiffs have a right of action on the bond ?

(2) Whether the condition contained in the bond that the money is payable "when the caste shall demand" is a condition precedent to recovery by the plaintiffs thereon?

(3) If so, whether a demand by the caste can mean a demand by the majority of the caste ?

7. The suit was dismissed and Rs. 51 certified as the costs of the defendant's solicitor. This sum with Rs. 50 to meet the costs of reference has been deposited in Court by the plaintiffs.

JUDGMENT OF THE HIGH COURT.

We answer the questions as follows :

(1) That the plaintiffs as nominees of the caste have a right of action upon the bond ;

(2) That the condition in the bond, that the money is payable "when the caste shall demand it," is a condition precedent to recovery by the plaintiffs, but that the demand made by the suit was sufficient, provided it was brought with the sanction and authority of the caste ; and

(3) That a demand by the majority of the caste is sufficient, if their wish has been ascertained by resolutions at a duly convened meeting of the caste.

The costs of reference to be costs in the case to be taxed by the Taxing Master of this Court as on the Original Side.

1895.
NARSU
KONARI
VS.
LINGUJI
MANKUJI.

1895.
Feb. 15.

MANEKLAL MOTILAL AND ANOTHER, PLAINTIFFS, versus
H. A. ACWORTH, DEFENDANT.

Bombay Municipal Act (III. of 1888), sections 301, 527—Payment of compensation to owner of land where there is no dispute—Notice—Limitation.

On the 14th December 1891, the defendant took possession of land belonging to the plaintiffs for purposes of street improvement. The defendant at first offered compensation at the rate of Rs. 25 a square yard. The plaintiffs wanted Rs. 60. On the 23rd February 1892 the defendant wrote (without prejudice) increasing his offer to Rs. 50. This letter remained unanswered for two years, when on 14th February 1894 the plaintiffs wrote, asking to be paid the compensation due, but not naming any particular sum. They were told that their claim was barred. They then filed this suit.

Held, that section 527 of the Bombay Municipal Act (III. of 1888) did not apply to such a suit as the present; that no notice to the defendant under that section was necessary before suit filed; and that the suit was not barred by limitation.

CASE stated for the opinion of the High Court under section 69 of the Presidency Small Cause Courts Act (XV. of 1882) by C. W. Chitty, Chief Judge.

1. This was a suit brought by the plaintiffs to recover from the defendant a sum of Rs. 1,165, as compensation for land of the plaintiffs taken up by the defendant, the Municipal Commissioner, for street improvement, and in the alternative for the same sum as damages for the breach of contract on the part of the defendant to pay the purchase-money for the said land.

2. In this case the only defences raised were: (1) that notice under section 527 of the City of Bombay Municipal Act of 1888 was necessary before suit filed, and (2) that the suit was barred by limitation. On both these points I found for the defendant, and the suit was accordingly dismissed and the defendant's professional costs Rs. 51 certified.

3. The facts of the case (which were not in dispute) are fully set out in my judgment, as are also the reasons for my decision. A copy of such judgment is hereto annexed, and for brevity's sake I crave leave to refer to the same.

4. At the request of the plaintiff's counsel I made my judgment contingent on the opinion of their Lordships. The only questions to be submitted are:

(1) Whether in this case notice under section 527 of the City of Bombay Municipal Act, 1888, was necessary before suit filed?

(2) Whether this suit is barred by limitation?

5. The plaintiffs have deposited in Court the Rs. 51 professional costs and Rs. 50 to meet the costs of reference.

The following was the judgment of the Chief Judge :

This is a suit brought by the plaintiffs to recover from the defendant a sum of Rs. 1,165 as compensation for the land of the plaintiffs taken up by the Municipal Commissioner for street improvement, and in the alternative for the same sum as damages for the breach of contract on the part of the defendant to pay the purchase-money for the said land. In this case there is no dispute as to facts. The land in question (some 23·3 square yards) was taken possession of by the Municipal Commissioner on the 14th December 1891. The Municipal Commissioner at first offered compensation at the rate of Rs. 25 per square yard. The plaintiffs wanted Rs. 60. On the 23rd February 1892 the Municipal Commissioner increased his offer to Rs. 50 (without prejudice). This letter remained unanswered for two years, when on 14th February 1894 the plaintiffs without directly accepting that offer asked the defendant to pay them the compensation due. They were then told that their claim was time barred. The only defences raised in this case were, as in the last case, (1) that notice under section 527 of the City of Bombay Municipal Act, 1888, was necessary before suit filed and (2) that the suit is barred by limitation. In this case the plaintiffs stand in a somewhat better position than the plaintiffs in suit No. 18029 of 1894 so far as regards the lapse of time, inasmuch as they bring their suit within three years. Before proceeding to the questions under section 527, I may deal with the case as one for damages for breach of contract. As such, in my opinion, it cannot lie, as there was never any contract between the plaintiffs and defendant for sale and purchase at Rs. 50 or any given price. It is argued that the offer of Rs. 50 of the defendant, dated 12th February 1892, remained open till the letter of the plaintiffs of 14th February 1894. I am of opinion that the proposal was revoked by lapse of time (see Indian Contract Act, section 6 (2)). It could hardly be said that two years was a reasonable time for which it should remain open for acceptance. But further than this the letter of 14th February 1894 is, in my opinion, no acceptance, and as the letter of 12th March 1894 must amount to a withdrawal of the offer, it follows that there was no contract. I now proceed to consider the case under section 527. First, as to limitation, I am of opinion that this section must be held to apply to cases like the present. There is certainly nothing in the section itself to exclude it. Indeed, the words "Suit in respect of any act done in pursuance, or execution, or intended execution of this Act, or in respect of any alleged neglect or default in the execution of this Act," would seem directly to include it. This is a suit for compensation for land taken up under the Act (section 299) and for default in payment of such compensation

1875.

M. NEKLAL
MOTILAL
vs.

H.A. COWETH.

1895.

MANEKLAL
MOTILAL
vs.
H.A. ACWORTH.

(section 301). This point has been before the learned Second Judge in suit No. 16139 of 1894, and before him and myself in the Full Court, and I am fortified by his judgment in that suit. I think that the six months allowed by section 527 must be taken to be the period of limitation applicable to this case. It is admitted that if that be so, the suit is barred, and so I must hold it. As to notice, there again it appears to me that section 527 must apply. It has been argued that section 527 was only intended to apply to cases of torts and quasi-torts. If that be so, it is difficult to account for the wording of sub-section 2(d), which clearly contemplates other actions than those for damages. In the case in 12 B.H.C. cited by the plaintiffs, the word 'compensation' seems wide enough to include such cases as the present. The intention of the Legislature in requiring notice is to enable persons acting under the Act to tender reasonable compensation, and there seems no reason why it should not apply to cases like the present. I must hold that no notice having been given the suit is not maintainable. The suit is dismissed and defendant's professional costs Rs. 51 certified. My judgment will be contingent on the opinion of the High Court on a case to be stated at the request of the plaintiff's counsel.

Russell for plaintiffs.

Macpherson for defendants.

The following cases were cited:—*Sorabji N. Dundás vs. The Justices of the Peace for the City of Bombay*⁽¹⁾; *Price vs. Kailut Chandra Ghose*⁽²⁾; *Poorno Chunder Roy vs. Balfour*⁽³⁾; *Ranchod Varujbhai vs. The Municipality of Dakor*⁽⁴⁾; *Chunder Sikhur vs. Obhoy Churn*⁽⁵⁾; *Municipal Committee of Moradabad vs. Chattri Singh*⁽⁶⁾; *Nagusha vs. Municipality of Sholápur*⁽⁷⁾.

JUDGMENT OF THE HIGH COURT.

SARGENT, C.J.:—The facts of the case which have led to this reference are set out in the judgment of the Chief Judge of the Small Cause Court. The two questions submitted to us are: (1) whether in this case notice under section 527 of the Municipal Act of 1888 was necessary before suit filed; and (2), Whether the suit is barred. It will be convenient to deal first with the second question. The suit in question presents the claim of the plaintiff in a double aspect, 1st, as a claim for compensation which the Commissioner is directed by section 301 to

(1) 12 B. H. C. R. (O.C.J.) 250.

(2) 5 B. L. R. App. 50.

(3) 9 Cal. W. R. 535.

(4) I. L. R. 8 Bom. 421.

(5) I. L. R. 6 Cal. 8.

(6) I. L. R. 1 All. 269.

(7) I. L. R. 18 Bom. 19.

pay to the owner of the land taken up under sections 298, 299, and 2ndly, for damages for breach of an alleged contract to purchase the land. The Judge of the Small Cause Court has found that there was no such contract of purchase; the question therefore submitted to us has only to be answered with reference to the first branch of the claim, namely, for compensation. When the parties are not agreed as to the amount of compensation to be paid as directed by section 301, or, in other words, "the amount is in dispute," section 504 provides the course to be followed, viz., by application to the Chief Judge of the Small Cause Court within one year from the date when such compensation became claimable. The facts as stated by the Judge show that the last offer of the Commissioner of 50 rupees per square yard on the 23rd February 1892 had not been accepted and that no agreement of any sort was come to between the parties within the year from the date of the Commissioner taking possession of the plaintiffs' land. It was contended for the Commissioner that under these circumstances all claim to compensation under section 301 was barred by section 504. I cannot doubt that the language of the latter section shows that the course provided for, in the event of the amount of compensation being in dispute, is the only one open to the owner of the land taken; in other words, that, when there is such dispute, it is in substitution for the ordinary right of action in the Civil Court to recover the compensation as directed to be paid by section 301, and therefore, after the expiration of a year, if the owner has not been paid, his only course is to agree to the Commissioner's terms. In that case it was contended for the Commissioner that the plaintiffs' cause of action, if not questioned, would be for breach of contract, and not the right to compensation given by section 301. That is, in my opinion, a mistaken view of the jural relations between the parties. The obligation to pay compensation for the land based on its value which the Act imposes on the Commissioner by section 301 would still be in force, although proceedings under section 504 might be barred, and if the plaintiff accepts the value placed on the property by the Commissioner, he is entitled to enforce payment of it, assuming of course that he can establish his title as owner. I think that the correspondence between the

1895.

MANEK Lal
MOTILAL
vs.

H.A. ACWORTH.

1895.

MANEK LAL
MOTILAL
vs.
H.A. ACWORTH

parties, beginning with plaintiffs' letter of 14th February 1894, shows that plaintiffs have accepted the value offered by the Commissioner by his letter of 23rd February 1892. That valuation was never withdrawn or revoked. In the above view of the relation of the parties, clause (2) of section 6 of the Contract Act has no application, and the correspondence shows that the Commissioner's only objection to pay the compensation claimed was that the claim to any compensation whatever was barred. It was not contended that the suit was barred by the general law of limitation, and the second question must therefore be answered in the negative. As to section 527, whatever may be the suits to which it is applicable, I do not think it could have been intended to apply to a suit arising out of section 301. It is plain it could not apply to proceedings under section 504, as they can be brought within a year from the time when the compensation became claimable, and that being so, it must I think be inferred that section 527 was not intended to apply in the present case, as the time, when both the compensation became claimable and the cause of action accrued (according to the above view of the present suit) under section 301 of the Act is the time when the lands were taken possession of by the Commissioner.

FARRAN, J. — I agree in the answers given by the Chief Justice, but I have also prepared a judgment expressing my reasons. This is a suit for the value of land acquired by the Municipal Commissioner under the provisions of sections 298 and 299 of the Municipal Act. The more cumbrous phrase "compensation for the value of the land" adopted in section 301 is, I think, only used to suit the convenience of the draftsman. The land has been rightfully acquired by the Commissioner. The plaintiff makes no complaint on that head. He merely asks to be paid the price of the land ascertained upon the basis of its value which the Act directs that the Commissioner shall pay him. The first question submitted to us is, whether such a claim is under section 527 barred after the lapse of six months from the time when the land is acquired (at which time I apprehend the plaintiffs' cause of action accrued) and whether the notice of action must under that section be given to the Commissioner. It has long been settled law that the provision of the English

Statute analogous to, and to my mind undistinguishable from, the terms of the section with which we are dealing, do not apply to claims arising out of contracts or quasi-contracts, but do apply to claims arising out of torts or quasi-torts done under colour of, or in carrying out the provisions of the Statute : *Midland Railway Company vs. Local Board of Wellington*.⁽¹⁾ But the Courts disregarding the form of the action inquire into the nature of the transaction out of which the claim arises. If we ask whether this claim arises out of a tort, injury, or quasi-delict, the answer must, I think, unhesitatingly be in the negative. It is a simple action for the price of land which the terms of section 301 impose upon the Commissioner the obligation to pay. The obligation to pay that price is of the same nature whether (1) the owner assents to the valuation of the land placed upon it by the Commissioner, (2) whether the value is determined by the Chief Judge of the Small Cause Court, and (3) whether it is left undetermined. It is admitted that in the former two cases the section does not apply. I am quite unable to distinguish the third case in principle from them. In all three cases the obligation to pay is imposed by the terms of section 301, and does not arise from the manner in which the amount of the price to be paid is arrived at. When goods are purchased to be paid for at the market rate, the obligation to pay for them arises from the contract of purchase not from the ascertainment of the market rate. When land is acquired to be paid for at its value, the obligation to pay arises from the acquisition of the land in accordance with the provisions of the Act, and not, it appears to me, from the ascertainment of its value by agreement or otherwise. It is quite clear to my mind that the framers of the Act did not intend the short period of limitation of six months to apply to this case. It would appear unreasonable that they should do so. Section 504 gives the owner twelve months to apply to the Chief Judge to determine the value of the land in case of dispute, but if section 527 applies to the claim, it is barred after six months. It cannot be that the value is to be ascertained after the claim for it is barred. In my opinion section 527 does not apply to the case at all. Some difficulty in adopting this view arises from the wording of sub-clause 2 (d) to the section, but relief other than damages may be sought

1895.

MANEKIAL

MOTILAL

vs.

H. A. ACWORTH.

(1) L. R. 11 Q. B. D. 789.

1895.

MANEKLAL
MOTILAL
vs.
A.H.ACWORTH.

in respect of a delict, or wrong, or quasi-wrong committed, *e. g.* a declaration, or mandatory injunction, or possibly such relief as was asked for in *Nagasha vs. Municipality of Sholdapur*⁽¹⁾; and damages are sought in cases of breach of contract, to which the section does not admittedly apply. I answer the first question therefore in the negative.

Section 504 prescribes the mode, and, in my opinion, the only mode, in which in case of dispute the value of the land can be determined. The imperative words used in the section almost compel, I think, that conclusion, and the consideration that the policy of the Legislature has long been to have the value of land taken up for a public purpose determined by a specially constituted tribunal establishes its correctness. (See Bombay Act III. of 1872, section 28), and Act X. of 1870 *passim*.) If the owner of the land disputes the Commissioner's valuation (which usually assumes the form of an offer, and often as in this case of an amended offer) he must make an application to the Chief Judge within a year. If he does not do so, the result, in my opinion, is that he loses the power of effectually disputing the Commissioner's valuation, but does not lose his right to the amount of that valuation. The section does not enact that his non-application shall have the latter result, and it appears rather an unreasonable, and certainly not a necessary implication to draw from its provisions that it shall, especially as these provisions are conversant only with the determination of the quantum of value. There is nothing, in my opinion, in the provisions of section 504 which deprive the owner of the land, who does not apply under it to have his compensation determined, of his right to compensation, if independently of its provisions he has a remedy to receive it, nor is there in the section anything to relieve the Commissioner in such case from his obligation to pay the value of the land. That the owner has a remedy independent of the provisions of section 504 is, I think, clear. The section only deals with cases where there is a dispute as to the value of the land, and leaves those cases where there is no such dispute; but when the Commissioner from doubt as to the title of the owner, or for some other reason, as in this case, arbitrarily declines to pay, in such cases the owner is left to his ordinary remedy, no special mode of procedure

(2) I. L. R. 18 Bom. 19.

being prescribed. Cases in which there has been a dispute but in which the owner abandons his claim to dispute the valuation of the Commissioner, fall, it appears to me, within the latter category. It would be absurd for the owner to apply to the Chief Judge to determine the amount of compensation, saying, "I disputed the valuation of the Commissioner, but I do so no longer. Determine the amount." There would be nothing left for the Court to determine. That would not be making an application to the Court in case of dispute as to the amount, but in a case where there was no dispute. Such, I think, is the present case, and the plaintiffs have properly resorted to the ordinary jurisdiction of the Court. As to limitation, the case falls therefore under the general law, and is admittedly not barred by its provisions. I agree therefore that the second question also should be answered in the negative.

M. A. PATHERIA, PLAINTIFF, versus MOHUNDA'S KAMALSI,
DEFENDANT.

1895.
July 18.

Contract—Indent of goods to arrive—Agreement to retire drafts against such goods—Prepayment—Goods not according to sample—Right of indenter to refuse to retire the drafts and raise the defence that goods were not according to sample.

The defendant contracted to purchase goods by sample from the plaintiff to be ordered out from Europe in four lots. The contract provided (clause 3) that the defendant should accept on presentation and pay at maturity the drafts to be drawn upon him in respect of the goods, and (clause 4) that in default of his so doing the plaintiff might retire the drafts and re-sell the goods on his account and claim from him the deficiency so arising. The defendant in due course paid for and took delivery of the first lot, but having found the goods comprised in it not according to sample, he thereupon declined to accept or pay the drafts against the other three lots. The plaintiff accordingly retired such drafts and re-sold the goods on defendant's account and brought this suit to recover the deficiency arising on such re-sale. It was found as a fact that the goods of the last three lots were not according to sample.

Held, that the defendant was justified under the terms of the indent in declining to retire and pay the drafts and take delivery of the goods; that in this suit it was open to the defendant to show that the goods were not in accordance with the sample; and that the goods being shown to be not in accordance with the sample that afforded a good defence to the plaintiff's claim.

CASE stated for the opinion of the High Court under section 69 of the Presidency Small Cause Courts Act (XV. of 1882) by C. M. Cursetji, Third Judge.

1895.
MANEKLAL
MOTILAL
VS.
A.H.ACWORTH.

1895.

M. A. PA-
THERRIA
vs.
MOHUNDÁS
KAMALSI.

1. In this suit the learned Chief Judge and myself sitting together in Full Bench under section 37 of the Presidency Small Causes Court Act of 1882 having differed on questions of law, it becomes necessary to make this reference to the High Court under the provisions of section 69 of the said Act.

2. The following are the facts of the case as found by me on the evidence produced by the parties before me in the Court below. The plaintiff sues to recover damages for the defendant's failure to take delivery of certain watches indented for by the defendant through the plaintiff. The damages claimed are the difference between the indent price and the price subsequently realised by re-sale by the plaintiff on account of the defendant. The defendant gave the plaintiff an order for a certain description of watches according to a particular agreed sample, the same to be procured from Europe and delivered in Bombay in four different lots or shipments of six dozen watches each. According to clause 3 of the indent defendant undertakes to accept on presentation and pay at maturity the drafts to be drawn upon him in respect of the goods so ordered. The first shipment arriving was found not to be according to sample. The defendant however paid the draft, and took delivery of the goods, but he did this only on a promise by the plaintiff of an allowance to be made to him. This allowance not being made, the defendant refused to accept the subsequent drafts, the second of which fell due on 10th March 1894. The day before such date the defendant gave plaintiff notice that he would not take delivery of the subsequent three shipments, as the goods were not according to his order. The plaintiff then retired the draft and without more sold the goods comprised in the said subsequent three shipments by public auction. He realised something less than the indent price and brought this suit for the deficit. The said three shipments so sold by the plaintiff were not according to the agreed sample; in other words, were not the goods as per defendant's indent, and the defendant in denying his liability to make good the deficit, pleads he was not liable to accept the said goods, and therefore not liable to pay the damages as claimed in this suit.

3. The facts being as above stated, I found in the Court below that the said goods so sold by public auction as aforesaid by the

plaintiff, being goods not equal to the sample as agreed to under the contract, the defence set up as above stated was a good defence, and the plaintiff was not entitled to recover. I accordingly dismissed the plaintiff's suit.

4. The plaintiff having moved for a new trial before the learned Chief Judge and myself on the ground that the defendant failed to perform his part of the contract, it has been my misfortune to find myself differing from the opinion of the Chief Judge. It is with utmost diffidence and reluctance that I differ from him; and I do so mainly with a view to the point, which is one of considerable importance to the mercantile community in Bombay, being settled by higher authority.

5. The questions which we have thus to refer for the opinion of the Honourable the High Court are—first, whether, assuming that the goods comprised in the last three shipments as aforesaid were not according to sample, the defendant was justified under the terms of his indent in declining to retire and pay the drafts and take delivery of the goods? second, whether in a suit by the plaintiff to recover the deficit as aforesaid it was open to the defendant to show that such goods were not according to sample? and, thirdly, whether the goods being shown not to be according to sample, it would be a good defence to this suit?

6. I respectfully submit that all these questions should be answered in the affirmative. As regards the first of these questions, if we consider the position of the parties to the contract, at the most clause 3 of the indent, on which plaintiff chiefly relies, may operate as a condition precedent to the defendant's right to delivery and possession. It does not, I submit, bind the defendant to accept and pay at all events. If he fails to pay as provided, he precludes himself from claiming delivery or damages for non-delivery. In any suit by him for the goods indented for in trover or for damages his failure to pay as agreed under the said clause could doubtless be pleaded as a good defence and effectively put him out of Court. That however is not his position here. It is the plaintiff who is suing for not taking delivery. It is then, I think, open to the defendant, the goods offered being suspected of not being the goods contracted for, to decline to take them and pay for them, or rather to decline to pay for them

1895.

M. A. PATERIA
vs.MOHUNDAS
KAMALSI.

1895.

M. A. PA-
THERIA
vs.
MOHUNDAS
KAMALSI.

before being allowed to take them. It would be manifestly unjust to force the vendee to first pay for and then accept goods which he has good reason to suspect were not the goods ordered by him and leave him to sue for damages.

7. In such a case as this, where the defendant, the vendee, refuses to pay, it is clear that the plaintiff is in the position provided for by section 107 of the Indian Contract Act, and also by clause 4 of the indent, which reserves a power of re-sale. He has thus three courses open to him : to sue for the price, to re-sell and sue for the deficit, or to call for a survey and go to arbitration. He takes the second of these remedies, and the question then arises, is he entitled to recover the deficit from the defendant at all events, that is to say, whether the goods comprised in the said three later shipments were or were not the goods indented for. It is contended for the plaintiff in this case, that he is in no way bound to show that the goods so sold by him under clause 4 of the indent corresponded with the sample. It is further contended for the plaintiff that not only is it not incumbent on the plaintiff to show this, but that it was not open to the defendant to show that the said goods were not the goods indented for by him, or that even if defendant did show this, that that would not be a good defence to this action. I am strongly persuaded that this contention is altogether invalid, unreasonable, and inadmissible in law. To allow this contention would be to allow the vendor to take advantage of his own manifest wrong with impunity ; for after undertaking to supply, say, watches or valuables, on the vendee refusing to pay, the vendor might arbitrarily sell on his account nails or tintacks and yet claim to recover the deficit between the price of watches and the price of tintacks.

8. I have not been able to find any decision exactly in point. The law, however, as may be gathered from the various authorities, is clearly opposed to the contention of the plaintiff as above stated. The contract between the parties to this suit is a contract for sale by sample. In such a case there is an implied warranty that the bulk shall correspond with the sample. If it does not, the buyer is at liberty to reject the goods (see Benjamin on Sale, 4th. Edn., pp. 934, 940, 941 ; Blackburn on Sale, 2nd Edn., pp. 500, 501 ; Chalmers on Sale of Goods, p. 83). The present

is not a case of sale of specific goods answering the description, nor of a specific chattel in which the property has passed to the buyer. As to the distinction drawn between specific goods and any goods see Mr. Benjamin's remarks at pp. 936, 937 of his work. That distinction, however, need not be considered here.

9. The case here is one of a contract to supply goods generally according to a sample, that is to say, of a contract with a condition that goes to the very essence of it, and it being found on the evidence that the goods offered by the plaintiff did not correspond with the sample the defendant was at liberty to refuse to accept. The default of the defendant, if default it was, in not paying beforehand, cannot, I submit, place the plaintiff in a more advantageous position than that of a vendor who claims damages for the vendee's breach in failing to take delivery. He must show that the goods offered were the goods contracted for. The third clause of the indent provides for the manner in which a foreign supplier may protect himself against a defaulting purchaser, but it cannot, I submit, be justly made to operate so as to do away with the vendor's liability to show that the goods were equal to sample, or absolutely to debar the vendee's showing they were not.

10. Before the plaintiff could recover the deficit, the identity of the goods re-sold against the defendant must be re-established, and unless that is done, "the vendee might be compelled to receive and pay for a thing different from that which he contracted." The reservation to re-sell contained in clause 4 of the indent as well as in the provisions of section 107 of the Indian Contract Act must be taken to apply not to any goods whatsoever, but only to the goods of the quality contracted to be sold by the plaintiff. The words of the indent "to dispose of the goods" can only refer to the goods of the quality contracted for and agreed to be supplied and to no others. Now, as a matter of fact, it has been established by evidence adduced by the defendant that the three subsequent shipments as aforesaid were not the goods of the quality contracted for, and therefore when plaintiff sold the same against the defendant, he could hardly be held to have re-sold the goods. There was, in effect, no re-sale as provided for by clause 4 of the indent or by section 107 of the Indian Contract Act, and before the plaintiff could be entitled to any claim for a deficit there must be a valid re-sale. To

1895.

M. A. PA-

THERIA

vs.

MOHUNDAS

KAMALSI.

1895.

M. A. PA-
THERIA
vs.
MOHUNDAS
KAMALSI.

make such a re-sale valid, the identity of the goods must be established. But the plaintiff here did not identify the goods, and did not even make an attempt to show that they were the goods under the indent.

11. Much stress was laid by the pleader for the plaintiff on section 54 of the Indian Contract Act. I am, however, unable to perceive how that section supports the plaintiff's contention set forth in clause 7 of this reference. If the defendant's promise to pay was reciprocal with plaintiffs to deliver, and the defendant does not pay, the defendant certainly could not claim delivery as already above stated by me, and he would have to compensate for loss. This position is not disputed. The real question here is, what is the loss or damage the plaintiff has suffered? It can only be what results directly from the buyer's or defendant's breach of contract. This is a suit for damages on the ground of the buyer's failure to take delivery and the amount realised by the auction-sale must be the measure of damages. But the facts as found show the goods so sold by auction were not the goods contracted for; the plaintiff has therefore proved no damage and is not entitled to any relief.

12. The case that comes nearest to the present case, and touches on the question before the Court, is the case of *Thomas Shortt vs. Abdul Rehiman*.⁽¹⁾ The facts of that case are almost identical with the facts above stated, and though that case was disposed of on a question of jurisdiction, the remarks of Couch, C.J., in the judgment delivered by him are instructive, and strongly support the defendant's case here. In that case the plaintiffs, the vendors, instead of suing for damages for not taking delivery, sued on the bill, and were held not entitled to credit the sale-proceeds to the account of the defendant in order to bring the claim within this Court's jurisdiction. The Chief Justice went on to say, "They (the plaintiffs) may sue in this Court (High Court) on the bill, or if anxious to sue in the Small Cause Court, they may sue there for not accepting the goods, but their position in that case would be different, for the onus would be upon them of proving that the goods were equal to the sample." This is precisely the position of the plaintiff in this suit. He sues for not accepting the goods, and the onus lay on him to prove that the goods comprised in the said three shipments

(1) Bom. H. C. (O.C.J.) 53.

were equal to the sample, or, in other words, the said goods were the goods contracted for. This onus the plaintiff has entirely failed to discharge and cannot therefore succeed in this suit.

The Chief Judge submitted the following statement :

The facts of this case are set out above by the learned Third Judge. It appears that the goods delivered against the first shipment not having been according to sample, the defendant had reason to suppose that the goods to be delivered against subsequent shipments were equally so, and that he therefore declined to accept and pay the draft drawn against the last three shipments. On attending the auction-sale held by the plaintiff, the defendant saw the goods and came to the conclusion that they were not according to sample. The learned Third Judge has held that such conclusion was correct, and I do not wish to disturb that finding, though it is possible that I might not have arrived at the same conclusion on the evidence offered.

2. The decision of this case seems to me to turn entirely on the construction of the contract between the parties. I was, and am, of opinion that the defendant having failed to take up and pay the drafts at maturity, the plaintiff was justified under clause 4 of the contract in selling the goods and calling on the defendant to make good the deficiency. It was not, I think, open to the defendant at the hearing to say that he suspected that these goods would not be according to sample, that such suspicion had subsequently proved to be correct, and that therefore he was justified in declining to act as he had by his contract agreed to act.

3. The defendant, if he had taken up and paid the drafts, would have had his remedies under the contract. The main object of clause 4 of the contract seems to me to be to secure to the plaintiff payment in advance, and this object would be completely frustrated if the defendant were allowed to raise this defence. Clause 4, in my opinion, lays down a condition with which the buyer must comply before he can receive the goods, and it also prescribes the plaintiff's remedy in case the buyer does not comply with that condition.

4. I agree with the learned Third Judge that the questions for the opinion of their Lordships are as stated in paragraph 5 of the case.

1895.

M. A. PATERIA
vs.
MOHANDAS
KAMALSI.

1895.

M. A. PATERIA
vs.
MOHUNDAS
KAMALSI.

JUDGMENT OF THE HIGH COURT.

Sir C. SARGENT, C.J.—We are of opinion that the several questions submitted to us should be answered in the affirmative.

It is admitted by the Advocate General, who appeared as counsel for the plaintiff in the argument before us, that the relations subsisting between the plaintiff and the defendant under the contract in question were those of vendor and purchaser. The case must therefore, as it has been throughout, be answered on that footing.

The sale of the watches having been a sale by sample, there was an implied warranty by the vendor that the goods were equal in quality to the sample (Contract Act, section 112), and the Indian Contract Act following in this respect the English law, provides that in the case of a contract with a warranty for the sale of unascertained goods, when the warranty is broken, the buyer has the option of refusing to accept the goods when tendered (section 118). The first question which we have to consider is, whether the contract in this case deprives the purchaser of that right. I think that it does not. The parties might have contracted that the purchaser in any case should be bound to accept the goods and that his only remedy in the event of their proving not equal to sample should be a claim for damages, but the contract does not so provide. It contemplates a claim being made in respect of the goods. Such claim may obviously be a claim to refuse them as not being of the contract quality. The common law right of the purchaser not to accept the goods on the ground that they are not equal to sample is left untouched. It follows that in the case before us the defendant would have been justified in refusing to accept the watches. And that if he had paid for them in advance he would, when the watches were tendered to him and refused, have been entitled to a return of his purchase-money. The same state of facts would, in my opinion, have afforded to the defendant a good defence upon the bill, or on the contract to accept the bill. The consideration for the agreement to accept the bill is the importation by the plaintiff of goods in accordance with the contract. If the defendant, when asked to accept or pay the bill, is able to show that the goods against which it is drawn are goods which he is not bound to accept, the consideration for his agreement fails, and he is not bound to carry it out.

The learned Chief Judge has correctly, in my opinion, viewed

clause 3 of the agreement as providing for prepayment for the goods, which the provisions of clause 4 gives the plaintiff a stringent means of enforcing; but viewing it in that light it is, I think, a good defence to a claim for prepayment for goods to show that the goods ordered have not been invoiced. The onus no doubt is on the defendant to establish the failure of consideration, but if he is able to do so, the legal result follows upon it. The defendant having been justified in his refusal to accept and pay the bill, the plaintiff was not entitled to put in force the provision of clause 4, and is not, I think, entitled to damages because the defendant refused to pay in advance for goods which he was not bound to accept.

STARLING, J.—In this case I entirely agree with the answers which the Chief Justice proposes to give to the questions submitted by the Judges of the Court of Small Causes, and with his reasons for the same; but as I have looked at the matter in a narrower point of view and come to the conclusion that in that view the suit ought to be dismissed, I will shortly state my opinion. The defendant made a contract with the plaintiff that the latter should procure and cause to be shipped to him certain goods which were to be of a certain description and quality according to sample. The defendant further contracted that those goods should be insured and shipped in a particular manner, and then agreed that he would accept the bills which might be drawn against the invoice of the goods so shipped. Then the defendant contracted with the plaintiff that if he did not accept such bills, the plaintiff might sell “the goods” and recover the difference between the sale-proceeds and the amount of the bill from him. Now the whole contract being about certain specified goods, the words “the goods” can, in my opinion, refer only to goods which the defendant had ordered, and not to any goods the plaintiff or his agents might choose to send in pretended execution of the order, irrespective of whether they corresponded with what the defendant ordered or not. It has been found by the Judge who tried the case that the goods which the plaintiff sold were not goods of the description ordered by the defendant, consequently there was no contract in existence with regard to them under which the plaintiff was entitled to sell them on account of the defendant and there was no difference which the defendant had bound himself to pay,

1895.

M. A. PA-
THERIA
vs.
MOHUNDAS
KAMALSI.

1895.

M. A. PA-
THEBIA
vs.
MOHUNDAS
KAMALSI.

because he had only bound himself to pay the difference between the proceeds of the goods he had ordered and the bill which he had not paid. I am therefore of opinion that for the foregoing reasons the plaintiff is not entitled to maintain this suit, and that the third question put to us should be answered in the affirmative. If that question be answered, the suit must be dismissed.

1895.

July 31.

MANOCKJI MERWANJI MEHTA AND ANOTHER, PLAINTIFFS,
versus KHANSAHEB FURDUNJI PESTONJI AND WILLIAM
VALENTINE SPIERS, DEFENDANTS.

*Deposit by one joint debtor of policy belonging to him to secure the joint debt—
Liability of other joint debtor for premia paid by plaintiffs to keep the policy
alive.*

Where the first defendant alone deposited a policy of life assurance belonging to him to secure the repayment of the joint debt of himself and the second defendant,
Held, that the second defendant could not, in the absence of any special request, be held liable to the plaintiffs for *premia* paid by them in keeping the policy alive.

CASE stated for the opinion of the High Court under section 617 of the Code of Civil Procedure (Act XIV. of 1882) by C. W. Chitty, Chief Judge, and Rastamji Merwanji Patell, Second Judge.

1. This was a suit brought by the plaintiffs to recover from the defendants a sum of Rs. 715-2-0, being the amount of premia alleged to have been paid by the plaintiffs on the policy hereafter mentioned at the request and on the behalf of the defendants and interest thereon.

2. The case came on for hearing before me, the Chief Judge, when the following facts were proved or admitted by the parties. On the 11th April 1891 the defendants jointly borrowed from the plaintiffs a sum of Rs. 5,000, for which they passed a promissory note. As security for the said loan, the second defendant William Valentine Spiers deposited with the plaintiffs certain title-deeds of properties in Poona and Kirkee belonging to him. About eight months afterwards the first defendant also deposited with the plaintiffs a policy of assurance, No. 6519, dated the 29th January 1885, effected with the Oriental Government Life Assurance Company, Limited, on the life of him, the first defendant, for the sum of Rs. 5,000.

It was alleged by the plaintiffs that the deposit of this policy was made by both defendants, but beyond the fact that the deposit was made at the second defendant's house, that the body of the endorsement of assignment to the plaintiffs was in his writing, and that he no doubt consented to the deposit, the second defendant took no part in the deposit. The policy was not his, the endorsement was signed by the first defendant alone, and I was of opinion that the deposit was that of the first defendant, the second defendant on his part having deposited his title-deeds.

3. The plaintiffs filed a suit in the Court of the First Class Subordinate Judge at Poona on the promissory note for Rs. 5,000, and on the 3rd December 1892 obtained a decree against them, the decree declaring that the debt should be a charge on the property, the title-deeds of which were deposited by the second defendant, and on the policy abovementioned. This decree was with a slight variation confirmed by the High Court on the 3rd December 1894.

4. In execution of the decree of the Poona Court, the plaintiffs attached the policy in question, and on the 15th March 1894 it was sold under the order of that Court for a sum of Rs. 350. The circumstances attending that sale are such as to cast strong suspicion on the action of the plaintiffs. It was well known to them, inasmuch as it was stated on the face of the policy itself, that the surrender value was 35 *per cent* of the *premia* paid up to the date of surrender, or at the date of the sale a sum exceeding Rs. 1,000. Though this was within the plaintiffs' knowledge, they nevertheless attached the policy, and caused it to be put up for sale by public auction by the Poona Court. The second plaintiff attended the sale with a Pársi lady, an inhabitant of Bombay and a relative of his wife, to whom the policy was knocked down at the sum of Rs. 350. The second plaintiff with the lady received the policy from the Court, returned with it to Bombay, and then and there surrendered it to the company, himself receiving the cheque for the surrender value Rs. 1,019.

5. The plaintiffs during the continuance of the deposit of the policy paid *premia* on it to the extent of Rs. 612, which with interest thereon, Rs. 103-2-0, they seek to recover from the defendants in this suit. The plaintiffs filed a plaint in which it was alleged that the *premia* had been paid at the request and on the behalf of the defen-

1895.

MANOCKJI
MERWANJI
MEHTA
VS.
FURDUNJI
PESTONJI
AND
WILLIAM
VALENTINE
SPIERS.

1895.

MANOCKJI
MERWANJI
MEHTA
vs.
FURDUNJI
PESTONJI
AND
WILLIAM
VALENTINE
SPIERS.

dants. I was of opinion that the suit being based on a request, and no such request being proved, the suit must fail. I was also of opinion that there was no obligation, express or implied, on the part of the defendants or either of them to keep the policy alive, and that the plaintiffs would not be justified in doing so on their account. I also expressed an opinion that the policy not having been deposited by the second defendant he could not in any case be liable to the plaintiffs for the *premia*. I accordingly dismissed the suit and certified Rs. 85 as the second defendant's professional costs. It should also be mentioned that the plaintiffs' pleader requested me to state a case for the opinion of the High Court, but I did not do so at that time, thinking that as my decision had gone mainly on a point of fact, their Lordships would be unwilling to consider any point of law.

6. The plaintiffs brought the matter before the Full Court (consisting of us, the Chief Judge and the Second Judge,) when it was brought to our notice that a portion of a Gujarāti letter (Exhibit B.) had not been fully read to the Court in the first instance. This showed a clear request by the first defendant to the plaintiffs to pay the *premia*, and after calling on the first defendant to show cause, we set aside the order of dismissal as against the first defendant and passed a decree against him for the amount claimed.

7. We were both strongly of opinion that the second defendant could not be held liable, and that, in a case of a deposit by one joint debtor of his own property to secure the repayment of the joint debt, the other could not be called upon to recoup the creditor for any expenses which he might have incurred in preserving the property deposited. We were also of opinion that it could not in this case be held that the plaintiffs had paid these *premia* for the second defendant, or that the second defendant had enjoyed the benefit thereof, as contemplated by section 70 of the Indian Contract Act. As however this was a point of law arising in the case, and as the plaintiff's pleader had made the necessary request to the Court to submit a case for the opinion of their Lordships, we were unwilling to deprive the plaintiffs of the advantage of obtaining the opinion of the higher tribunal. We accordingly consented to submit a case under section 617 of the Code of Civil Procedure.

8. The only question will be :—Whether in this case the first

defendant having alone deposited a policy of assurance belonging to him to secure the repayment of the joint debt of himself and the second defendant, the second defendant can, in the absence of any express request, be held liable to the plaintiffs for *premia* paid by them in keeping the policy alive.

9. The plaintiff has deposited in Court the said sum of Rs. 85, and Rs. 50 to meet the costs of reference.

1895.

MANOCKJI-
MERWANJI
MEHTA
vs.
FARDUNJI
PESTONJI
AND
WILLIAM
VALENTINE
SPIERS.

JUDGMENT OF THE HIGH COURT.

The question must be answered in the negative. No order as to costs.

THE SECRETARY OF STATE FOR INDIA, PLAINTIFF, versus AHMED SAHEB BIN MAHOMED MAKBA AND ANOTHER, DEFENDANTS.

1895.

Sept. 2.

Landlord and tenant—Proviso for determining the lease if any portion of the demised premises should be required for a public purpose—Meaning of public purpose—Rent paid in advance, effect of—.

The defendants were tenants of the plaintiff under a lease for twenty-one years from the 1st May 1876. The lease contained a proviso that if the premises or any part thereof should be required by the lessor for any public purposes (of such requirement the lessor to be the sole judge) then the lessor might, by six months' notice, determine the lease and re-enter as for non-payment of rent. The land was required by the Municipal Corporation for purposes of road improvement. On the 20th December 1893 the Collector gave the notice required by the lease, stating that the land was required for a public purpose, viz. road improvement. On the expiry of the notice the defendants declined to give up possession. The defendants had paid rent in advance up to the 30th April 1896, although not required to do so by the lease. The plaintiff sued in ejectment.

Held, that the purpose mentioned in the notice to quit was a public purpose within the meaning of the proviso above stated: that the plaintiff was entitled to recover possession of the land, although it was really required by the Municipal Corporation for widening the public road; and that the payment of rent in advance up to the 30th April 1896 was no bar to the maintenance of this suit in ejectment before the expiry of the said period.

CASE stated for the opinion of the High Court under section 617 of the Code of Civil Procedure (Act XIV. of 1882) by Rastamji Merwanji Patell, Second Judge.

1. The plaintiff is the lessor and the defendants are lessees under a lease dated 11th September 1878 for a period of twenty-one years

1895.

THE SECRETARY OF
STATE FOR
INDIA
vs.
AHMED SAMEH
BIN MAHO-
MED MAKBA.

commencing with the 1st May 1876, subject to the following proviso for re-entry :

"Provided also and it is hereby further covenanted and declared between and by the said parties hereto each party severally covenanting as aforesaid that if at any time the said premises hereby demised or any part thereof shall be required by the said lessor, his successor, or assigns for any public purposes (and as to such requirement and as to what are to be deemed public purposes the said lessor, his successor, and assigns shall alone be the judges and decide), then it shall be competent to the said lessor by six calendar months' notice in writing to be given to the said lessees . . . such notice to expire at any time, the lease hereby granted or any such new lease as aforesaid to determine, and thereupon at once into and upon the said premises or any part thereof in the name of the whole to re-enter as in case of non-payment of rent as hereinafter provided for."

2. On the 20th of December 1893, the Collector of Bombay, acting under orders from Government, gave six months' notice to quit under the powers reserved to the lessor, and stating that the land was required for a public purpose, viz., the improvement of the public road. On the expiry of the notice he claimed to exercise the right of re-entry, but the defendants declined to give up possession.

3. The plaintiff subsequently filed an action in ejectment under section 41 of the Presidency Small Cause Courts Act (XV. of 1882). The suit was heard by me on the 1st of May last. It was admitted that the land was at first required by the Municipality, directly from the defendants, for the purposes of widening the public road, and that the Collector subsequently intervened and claimed possession of the land on determining the tenancy.

4. Two defences only were raised : 1st, that the purpose mentioned in the notice to quit was not a public purpose within the meaning of the proviso contained in the lease, that the words "when required by the lessor" contemplated the requirement for public purpose by the Executive Government for its own self and on its own behalf, and not for a sale to the Municipal Corporation, or for any public purpose suggested by a third party ; 2ndly, that the suit must fail as the plaintiff had accepted from the defendants five years' ground rent in advance from the 1st of May 1891 to the 30th of April 1896, and the defendants were at any rate entitled to retain possession till the 30th of April 1896.

5. The lease did not provide for the payment of rent in advance. I delivered judgment on the 9th May last disallowing both the defences, and ordering the defendants to vacate and give up possession

within fifteen days. At the request of the defendants' solicitor, the judgment is made contingent on the opinion of the High Court. For the sake of brevity I most respectfully crave leave to refer to the judgment hereto annexed as it sets forth the grounds of my decision.

6. The defendants have paid Rs. 50 into Court to answer the costs of reference. I therefore respectfully beg the favour of the opinion of their Lordships on the following questions :

(1) Whether the purpose mentioned in the notice to quit of the 20th of December 1893 was a public purpose within the meaning of the proviso hereinabove referred to?

(2) Whether under the circumstances herein mentioned the plaintiff was entitled to eject the defendants and to recover possession of the land, although the said land was really required by the Municipal Corporation for widening the public road?

(3) Whether the payment of ground rent in advance up to the 30th of April 1896 was a bar to the maintenance of this suit in ejectment before the expiry of the said period?

The following was the judgment of the Second Judge :

This is an action in ejectment by the Secretary of State for India against the defendants to recover possession of a piece of land on the Esplanade admeasuring about $163\frac{3}{4}$ square yards. The defendants have been lessees of the same piece of land for a number of years. The present lease is dated 11th September 1878 and is for a period of twenty-one years commencing with the 1st of May 1876, subject to a proviso of re-entry on six months' notice if the lessor should require the land for any public purpose. The lessees have paid five years' rent in advance, i.e. from 1st May 1891 to 30th April 1896, and the Collector's clerk and shroff have granted the usual receipt for the same. It seems that about the middle of 1891 the Municipality required this plot of land for purposes of road improvement. While negotiations were going on for the compensation to be allowed by the Municipality, the Collector of Bombay intervened on behalf of the Government, and at last on the 20th of December 1893 he gave a six months' notice "under the powers reserved to the lessor" determining the lease, and notifying that the land was required for a public purpose, viz. the improvement of the public road. The notice was given "by order of Government," and on the expiry of the six months, the Collector, by a letter of the 20th June 1894, claimed the right to re-enter on the land as provided by the lease. The defendants objected to this course and refused to deliver up possession on two grounds; first, that the words in the proviso "when required by the lessor" contemplate the requirement for a public purpose by the Executive Government and not by the Municipality, and therefore the purpose mentioned in the notice was not a public purpose with-

1895.

THE SECRETARY OF
STATE FOR
INDIA
VS.

AHMED SAHEB
BIN MAHOMED
MAKKA.

1895.

THE SECRETARY OF
STATE FOR
INDIA
vs.
AHMED SAHEB
BIN MAHOMED
MAKBA.

in the meaning of the proviso contained in the lease ; and secondly, that the Collector had been paid rent in advance under the lease for a period of five years expiring with the 30th of April 1896, and that at any rate the lessor could not be allowed to disturb the lessees' possession till then.

Substantially the same defences are now raised, and the defendants contend that they cannot be ejected on these grounds. The decision of the first question depends on the construction of the proviso in this lease. It runs, "Provided also and it is hereby further covenanted and declared that if at any time the said premises hereby demised or any part thereof shall be required by the said lessor, his successors, or assigns for any public purposes (and as to such requirement and as to what are to be deemed public purposes the said lessor, his successors, and assigns shall alone be the judges and decide), then it shall be competent to the said lessor by six calendar months' notice to determine the said lease and re-enter" &c. This proviso may be taken to amount to a condition as well as a covenant by force of the words used. The defendants contend that in construing this condition the words used, "required for any public purposes," must be strictly construed in favour of the grantee and against the grantor, and in support of this contention Elphinstone on the Interpretation of Deeds, pages 94-95, is relied upon. It is to be noted that this general rule is applicable in the case of private individuals when the words of a covenant or grant are doubtful or ambiguous. In the construction of grants or covenants as between the Crown and a private individual the rule does not strictly apply. The old rule has been to construe the grant most strongly against the grantee and in favour of the Crown. But I do not think we should trouble ourselves with that, as there is nothing doubtful or ambiguous in the wording of the proviso in question. The safer rule, therefore, to adopt is, that, whether the subject-matter of construction be a grant from the Crown or from a subject, it is always a question of intention to be collected from the language used and with reference to the surrounding circumstances. The proviso in the lease is no doubt introduced to reserve a power to the lessor to determine the lease at any time during the stipulated period of 21 years on giving a proper notice whenever the land is required for a public purpose. This power enures to the benefit of the lessor, and the lessee binds himself not to question the reasonableness of it because the lessor is appointed the sole judge as to the requirement, as well as to what are to be deemed public purposes. It is admitted that the land is required for purposes of road improvement, but nevertheless, say the defendants, the Government as lessors do not require to improve the road, but the Municipality want it, and the Government might sell the land to the Municipality, and that is a purpose not intended by the proviso in the lease. I do not think it lies in the mouth of the lessee to enquire whether the lessor is going to sell the land to the Municipality or to make a present of it. Nor do I think the lessee is entitled under such a covenant to import into it words which do not exist and are not intended, viz., "and such requirements shall be the lessor's own requirements and not those of any other public body." I am therefore of opinion that the first defence fails and does not avail the lessees.

As regards the payment of advance rent up to 30th of April 1896, does the receipt of it by the Collector estop him, or rather the lessor, from proceeding to enforce the condition and covenant contained in the proviso? I think not. The defendants' solicitor has not cited any authority to that effect, and it seems to me that while the proviso reserves to the lessor to give a notice to the lessees determining the lease at any time he requires the land for public purposes, it could not be said that he, the lessor, is precluded from so exercising that power simply because of the fact that rent has been paid in advance. For in law what is the effect of rent paid in advance? In terms of this lease the rent is not payable in advance, and the defendants paid it before it was due. There is no question here of forfeiture or breach of a covenant and subsequent waiver by acceptance of rent. Rent paid in advance is not paid in discharge of the obligation, but rather to make an advance to the landlord on the understanding that on the day the rent becomes due such advance might be taken into account against it. See *DeNicholls vs. Saunders*.⁽¹⁾ The obligation to pay rent does not arise until the rent-day comes, and until that day the rent is neither due nor payable. As observed by Willes, J., the lessee lends money to his lessor on the terms that the money should become rent on the rent-day, but until then it is nothing but a loan.⁽²⁾ Under the present lease the rent is payable on the 30th of April of each year, and it cannot be held that the payment of five years' rent in advance at a time when it was not due has the effect of precluding the lessor from enforcing the rights reserved to him, or that it entitles the lessees to retain possession till the 30th of April 1896.

I must therefore order the defendants to deliver up possession to the plaintiffs within fifteen days.

JUDGMENT OF THE HIGH COURT.

The questions (1) and (2) must be answered in the affirmative and question (3) in the negative. Costs of reference to be costs in the case, to be taxed by the Taxing Master of this Court as on the Original Side.

JAIKISSON BALARAM AND OTHERS, PLAINTIFFS, VERSUS
UMAJI BEJAYCHAND AND OTHERS, DEFENDANTS.

Hundi—Payment of shahjog hundi obtained by fraud—Forged hundi.

On the 12th January 1895 the plaintiffs received a telegram from Belgaum purporting to be sent by Meghaji Rampartab, instructing them to accept a *hundi* for Rs. 1,200 from Davlatram Chunilal, Miraj, of which the *rakkia* was Tilokchand Balaji. On the same day the defendants received the *hundi*, a *shahjog hundi*, which purported to be drawn by Davlatram Chunilal on the plaintiffs with a letter from

1895.

THE SECRETARY OF
STATE FOR
INDIA
VS.

AHMED SAHEB
BIN MAHOMED
MAKBA.

1895.

Aug. 17.

(1) L. R. 5 C. P. 594.

(2) See 22 L. T. Reports, p. 662.

1895.

JAIKISSON
BALARAM
vs.
UMAJI
BEJAYOHAND.

Tilokchand Balaji, their constituent, asking them to present it and advise him of its being paid. About 1 P.M. the defendants sent the *hundi* to the plaintiffs' firm, when it was duly entered in the *hundi nakalvahi*, and in the evening the plaintiff sent the amount to the defendants by their man Madhavrao. On the same day the defendants advised Tilokchand Balaji of the payment, and he thereupon paid over the moneys to Davlatram Chunilal. The plaintiffs in the usual course advised Meghraj Rampartab by letter of the payment, and it then transpired that the *hundi* was false and that the telegram instructing plaintiff to accept, it had not been sent by the firm of Meghraj Rampartab. Both plaintiffs and Tilokchand Balaji had been deceived by the person calling himself Davlatram Chunilal, who had persuaded the latter to pay him the amount of the *hundi* provided it was duly negotiated in Bombay. The plaintiffs sued the defendants to recover the amount of the *hundi* paid to them.

Held, that the *hundi* was not a forged *hundi* to which the ruling in *Davlatram Shriram vs. Bulakhidas Khemchand*⁽¹⁾ could apply, and that plaintiffs were not entitled to recover.

CASE stated for the opinion of the High Court under section 63 of the Presidency Small Cause Courts Act (XV. of 1882) by C. W. Chitty, Chief Judge.

1. This was a suit brought by the plaintiffs, a firm of Márwári merchants trading in Bombay in the name of Lachmondas Durgadás, to recover from the defendants Rs. 1,200, the amount of a *hundi* paid to them by the plaintiffs' firm.

2. The facts of the case, together with the reasons for my decision, are fully set out in my judgment delivered on the 4th March last, a copy of which is hereto annexed, and to which for brevity's sake I crave leave to refer.

3. The *hundi* in question was put in evidence and marked Exh. C.

4. The plaintiffs based their claim on two grounds: (1) that the defendants had on payment of the *hundi* being made to them expressly undertaken all risk and responsibility in respect and agreed to refund the money should the necessity for so doing arise, and (2) that the *hundi* being a *shakjogi hundi*, and having been paid as such, the defendants were by custom bound to refund. I held that the agreement relied on by the plaintiffs was not proved and that the custom relied on could not avail them, inasmuch as the *hundi* was neither lost, nor stolen, nor forged. I accordingly dismissed the suit and certified Rs. 135 costs of the defendant's pleader.

(1) 6 Bom. H. C. R. 24.

5. In accordance with the request of the plaintiffs' counsel I made my judgment contingent on the opinion of the High Court if there was any question of law which they desired to raise. The plaintiffs' counsel suggested these questions: (1) whether the *hundi* in question was a forged *hundi* or not, (2) whether in law a false or fraudulent *shahjogi hundi* is not governed by the same principles as govern a forged *shahjogi hundi*, (3) whether a *hundi* paid in consequence of a forged telegram is not to be treated in law as a forged *hundi*?

The defendants' pleader also suggested a fourth question: (4) whether, the defendants' name not having been endorsed on the *hundi*, it can be said to have been to *shah*?

6. As to question (1) it is a question turning on the construction of the document coupled with the facts as stated in my judgment, and I have no objection to make to it. As to questions (2) and (3) they appear to me to be questions rather of fact than of law, the answer of each depending on evidence of custom which the party alleging its existence must prove. The introduction in each case of the word "in law" cannot, I think, alter the real gist of the questions. No such custom was sought to be proved before me, and I apprehend that their Lordships will decline to answer these questions. The same remark applies to question (4). It was based on some words in the judgment of Sir J. Arnould in the case in 6 B. H. C. R. 24, but the custom suggested by it did not form part of the custom then established, and no evidence of any such extension of the custom was tendered before me.

7. Unless therefore their Lordships should differ from the view which I have taken of questions (2), (3), and (4), there will be one question—No. (1)—for consideration. The plaintiffs have deposited in Court the costs awarded and Rs. 50 to meet the costs of reference.

The following was the judgment of the Chief Judge:

This is a suit by the plaintiffs who trade in Bombay as Lachmondás Durgadás to recover from the defendants' firm of Bejaychand Umaji a sum of Rs. 1,200, the amount of a *hundi* paid by the plaintiffs to the defendants which the plaintiffs contend that they are entitled to be repaid. The facts are shortly as follows:—One Rampartab Meghraj does business at Sholapur, adjoining Belgaum, in the name of Meghraj Rampartab, and has a commission agency and *hundi* account with the plaintiffs. On the 12th January last the plaintiffs received a telegram from Belgaum (in which the sender's name is written as Meghaji

1895.

JAIKISSON
BALARAM
VS.
UMAJI
BEJAYCHAND.

1895.
 JAIKISSON
 BALARAM
 vs.
 UMAJI
 BEJAYCHAND.

Rampartab), instructing them to accept a *hundi* for Rs. 1,200 from Davlatram Chunilal, Miraj, of which the *rakhia* was Tilokchand Balaji. On the same day the defendants received the *hundi* in question, which purports to be drawn by Davlatram Chunilal on the plaintiffs' firm (Exhibit C) with a letter (No. 3) from Tilokchand Balaji of Miraj, their constituent, asking them to present the *hundi* for payment and acquaint him by telegram of its being paid. On the same day about 1 P.M. the defendants sent the *hundi* to the plaintiffs' *pehdi*, where it was in due course entered in the *hundi nakalwahi*. In the evening the plaintiffs sent the money to the defendants by their man Madhavrao. It is alleged by the plaintiffs that at the time of payment notice was given to the defendants of the discrepancy in the name of the Belgaum firm, and that payment was only made on the defendants accepting all risk and responsibility, and agreeing to refund the amount if the necessity for so doing should arise. This is denied by the defendants. On the same day after receiving payment the defendant wired to Tilokchand Balaji, "*Hundi 1,200 sikri give rupees good asami.*" Tilokchand Balaji thereupon paid Rs. 1,200 to the drawer Davlatram Chunilal on the 13th January. The plaintiffs in the usual course advised Meghraj Rampartab by letter of the payment of the *hundi*, and on the 15th January received from him a telegram that the *hundi* for Rs. 1,200 was false and that he had not wired to accept it. On this the plaintiffs went to the defendants, who, at the plaintiffs' request wired to Tilokchand Balaji, "*Received 1,200 rupees: hundiwala bolta hai hundi khoti hai: you make bandobust,*" to which Tilokchand replied that he was coming to Bombay. From the evidence of Tilokchand it would appear that this man Davlatram Chunilal was not known to him, that he had come to him at Miraj, and asked him to allow him to draw this *hundi* naming him as *rakhia*, that Tilokchand declined to pay him the amount unless he could first get the *hundi* negotiated in Bombay, and that it was not till he heard that it had been paid here that he paid Davlatram Chunilal the money. The plaintiffs were no doubt induced to pay the *hundi* owing to the *nisani* therein contained, "*Do you debit the amount in the account of Bhai Meghraj Rampartab of Sholapur,*" coupled with the fact of the telegram of advice (Exhibit A) being received. On the evidence as it stands there can only be one conclusion arrived at, namely, that the plaintiffs and Tilokchand Balaji were alike imposed upon by some person calling himself Davlatram Chunilal. The only question for my determination is whether the defendants having received payment as they did are bound by custom or law to refund the amount to the plaintiffs. The plaintiffs base their claim on two grounds, (1) that the defendants by express agreement undertook all risk and responsibility and (2) that by custom this *hundi* being *shahjog*, and having been paid as such, the defendants are bound to repay. As to the first contention I may say at once that I am unable to find that the so-called agreement has been proved. The evidence in support of it rests on the evidence of the plaintiff's man Madhavrao alone, and is stoutly denied by the defendants. The probabilities are all against such an agreement being asked for. The *hundi* was paid in due course to defendants as *shah*, and if as *shah* they were bound to refund, why take an

express agreement to the same effect? It may be that Madhavrao informed the defendants that they were paying on advice contained in a telegram, not in a letter, but beyond this I think there is no truth in that portion of the plaintiffs' case. If it were necessary to make any such stipulations they would have more probably been made at the time of presentment and the copying of the *hundi* in the *nakalvahi* than at the time of actual payment. I must hold that this agreement is not proved. As to the second ground the defendants denied that this was a *shahjog hundi*. It was argued that it must bear an endorsement, and that without such endorsement it is merely a *hundi* payable to bearer. It was also said that it could not be a *shahjog hundi*, because the name of the *rakhia* was mentioned. With this contention I am unable to agree. The *hundi* is clearly in form of a *shahjog hundi*, and the name of the *rakhia* being mentioned cannot alter its character. The *hundi* is very similar to the *hundi* in question in suit No. 1734 of 1894 tried by me, and that *hundi* has been put in evidence here, and admitted to be a *shahjog hundi*. Mr. Framji relied on some words in Sir J. Arnould's judgment,⁽¹⁾ but without express evidence (which has not been given) I could not hold in favour of the contention. Taking the *hundi* then as a *shahjog hundi*, and plaintiffs having paid it as they did, can they recover? In my opinion they can only do so if the *hundi* turns out to be lost, stolen, or forged. Loss or theft we are not concerned with here, and as to forgery I fail to see how this *hundi* can be said to be forged. It is no doubt false, inasmuch as the drawer had no assets with the plaintiff or Meghraj Rampartab at the time of drawing or afterwards, but this does not constitute a forgery. Nor, I think, can the insertion of a false *nisani* make it a forgery. This *nisani* is written no doubt to cause the drawee to believe that the drawer has the authority of the *nisaniwala* to draw against his account, but though that may be a statement false in fact, it is not a forgery. The plaintiffs indeed did not pay on the strength of the *nisani* alone, but on the telegram, which no doubt was forged. It is admitted that such a *nisani* is not acted on till advice is received. This being so, the plaintiffs cannot rely on the custom proved in the case before Sir J. Arnould, and in the subsequent cases in this Court of the liabilities of a *shah* in case of lost, stolen, or forged *hundis*. I cannot possibly without express evidence on the point extend that custom to a case of a false *hundi* like the present. The plaintiffs did not suggest in the plaint that there was any such custom. Their counsel stated that they had witnesses to prove the custom laid down in 6 Bom. H. C. R., and on Mr. Framji admitting that custom, the plaintiffs closed their case. It was not until their pleader had commenced his reply, that it was suggested that evidence should be called to show that the admitted custom extended to cases of merely false *hundis*. At that stage I could not receive it. It was too evidently an after-thought on the part of the plaintiffs to bolster up a falling case. Under these circumstances I am of opinion that the plaintiffs' suit must fail. The suit will be dismissed and defendant's professional costs Rs. 135 certified. As the plaintiffs have asked me to state a case for the opinion of the High Court,

1895.

JAIRISSON
BALARAM
VS.
UMAJI
BEJAYCHAND.

(1) 6 Bom. H. C. R. 24.

1895.

JAIKISSON
BALARAM
vs.
UMAJI
BEJAYCHAND.

this judgment will be contingent on such opinion, if the plaintiffs have any point of law to raise.

JUDGMENT OF THE HIGH COURT (Farran, C.J., and Tyebji, J.)

The question whether the *hundi* in this case is a forged *hundi* is not a question of law. It is a question of fact, which the law does not impose upon us the duty of answering. We may, however, say that, in the state of facts laid before us, we are unable to say affirmatively that the *hundi* is a forged *hundi*.

The real question which the parties wish us to answer, namely, whether the law as to refunds laid down in *Davlatram Shriram vs. Bulakidás Khemchand*⁽¹⁾ is applicable to a case like this also, a pure question of custom, which is a question of fact to be proved like other questions by evidence. We agree, however, with the Chief Judge of the Small Cause Court that the actual finding of Sir J. Arnould is, that in case of a forged *hundi* the *shah* is liable to refund its amount, and that the actual finding does not cover the present case.

The other questions are so purely questions of fact untouched by authority that we can give no answer to them.

Case remitted to the Small Cause Court with these answers. No order as to costs.

JIVAN NAVROJ, PLAINTIFF, versus JAIBAI, WIDOW, AND OTHERS,
DEFENDANTS.

1895.

Nov. 30.

Limitation—Decree payable by monthly instalments—“In default of payment execution to issue for the whole amount which may then be due”—Instalments paid late.

On the 10th June 1891, the plaintiff obtained a decree against the defendants, payable by Rs. 20 a month. The decree contained a provision: “In default of payment of one instalment execution to issue for the whole amount which may then be due.” The defendants paid into Court four instalments, on the 14th July, 15th August, 9th September, and 7th November 1891. These instalments were withdrawn by the plaintiff. On the 18th October 1894, the plaintiff applied for a notice to renew the decree.

Held, that the provision above mentioned was equivalent to saying, “In default of payment of one instalment, the whole amount shall become payable” and that execution of the decree was barred by the law of limitation.

(1) 6 Bom. H. C. R. 24.

CASE stated for the opinion of the High Court under section 69 of the Presidency Small Cause Courts Act (XV. of 1882) by C. W. Chitty, Chief Judge.

1895-
JIVAN
NAVROJ .
vs.
JAIBAL-

1. In this case a decree was passed on the 10th June 1891 in favour of the plaintiff against the three defendants then on the record for a sum of Rs. 603-7-8 (including costs) payable by Rs. 20 a month. The decree was on the printed form used by this Court in all suits for less than Rs. 1,000.

2. Four instalments were paid into Court by the defendants on the 15th July, 14th August, 9th September, and 7th November 1891, and were withdrawn by the plaintiff on the 16th July, 14th August, 18th September, and 9th November 1891 respectively. From the last named date nothing was done by either party until the 18th October 1894, when the plaintiff applied to me to issue a notice on the 2nd and 3rd defendants (the 1st defendant having died) to show cause why execution should not issue against them. I expressed a doubt at the time as to whether the decree was not barred by limitation, but allowed him to issue the notice to allow of the matter being argued.

3. The first notice was served on the 2nd defendant only, who put in an appearance by a solicitor. A renewed notice was granted against the 3rd defendant, which came on for hearing before me on the 30th January 1898. The plaintiff then by arrangement agreed to strike out the name of the 2nd defendant. The 3rd defendant though served did not appear.

4. The point of limitation was argued before me by the plaintiff's pleader, and after consideration of the authorities cited, I delivered judgment on the 4th February 1895, deciding that the decree was barred by limitation, but making my judgment contingent on the opinion of their Lordships.

5. In the first place I was of opinion that the words of the decree, "In default of payment of one instalment execution to issue for the whole amount which may then be due," could only mean that in default of payment the whole amount should become payable at once, and could not be equivalent to saying that the plaintiff should be at liberty to execute or have the option of executing his decree, though in one sense of course he would have such option.

1895.

JIVAN
NAVROJ
vs.
JAIBAI.

Putting that construction on the wording of the decree, I considered myself bound by authority in holding that the defendants having failed to pay the first instalment on the due date, the whole decree became then and there payable, and the subsequent payment of instalments or the acceptance of them by the plaintiff did not prevent the time from running (see I. L. R. 2 Bom. 356). It will be seen that in this case the first two instalments were paid late, the third in time, and the fourth also late.

6. The only questions are :

(1) Whether the words "execution to issue for the whole amount which shall then be due" are not equivalent to saying "the whole amount shall become payable?"

(2) Whether the time did not begin to run from the 10th July 1891, or at any rate from the 10th October 1891, and whether the decree is not, therefore, barred by limitation?

7. The plaintiff has deposited in Court Rs. 50 to meet the costs of reference.

JUDGMENT OF THE HIGH COURT.

The first question must be answered in the affirmative, and the second that execution of the decree is barred by the law of limitation.

1896.
Jan. 10.

HAJI ESSA SULLIMA'N, PLAINTIFF, versus DAYABHAI PURMA-
NANDA'S AND OTHERS, DEFENDANTS.*

*Vendor and Purchaser—Transfer of Property Act (IX. of 1882,) section 55—
Meaning of words "Material defect in the property"—Concealment
of defect—Right of purchaser to rescind.*

The words "material defect in the property" in section 55 of the Transfer of Property Act (IV. of 1882) include defects in the title to such property.

Where by conditions of sale the defendants were bound to remove such a defect, which they had concealed at the time of the sale,

Held, that, if they refused to remove it when requested so to do by the plaintiff, the plaintiff was entitled to rescind.

CASE submitted for the opinion of the High Court under section 69 of the Presidency Small Cause Courts Act (XV. of 1882) by Rastamji Merwanji Patell, Second Judge.

* Reported at I. L. R. 20 Bom, 522.

1. The defendants are executors of the estate of one Dayabhai Tribhuvandás, and the plaintiff is a purchaser from them of a piece of land at Memon Mohla, at an auction-sale held on the 6th March 1894. The plaintiff agreed to purchase the property at Rs. 2,900, and deposited Rs. 500 by way of earnest money. He now seeks to rescind the contract of purchase, and to recover back the deposit with interest and charges. He claims in all Rs. 584-8-0 and costs. One of the conditions of sale was that the vendors sold as trustees and would give such title as they had, and the purchaser should not raise any objections to their title, or make any requisition thereon, but should accept such title as they had or could give. The property having been in litigation for years, the plaintiff added a clause to his signature, with the consent of the vendors as follows: "If there be any claims or disputes about the house the vendor will clear the same at his own expense." The case was argued on both sides treating this clause as one of the conditions of sale.

2. The plaintiff sought to rescind the contract on three grounds, two of which I decided against him and in favour of the defendants. The third point I decided in favour of the plaintiff, viz., that one Jakeria Musa had laid a claim to the property as equitable mortgagee to the extent of Rs. 500 and interest thereon, and defendants had taken no steps to clear or dispose of the same, and that the said claim was known to the defendants before the date of the auction-sale, but they had failed to inform the purchaser or to notify it to him, and that the contract of sale was thereby vitiated under section 55 of the Transfer of Property Act.

3. The premises were originally mortgaged to the defendants' testator by one Hazrabai under a deed of mortgage dated 4th of January 1871. Jakeria Musa alleges that the testator had during his life-time raised a loan from him of Rs. 500, and delivered to him the said mortgage deed by way of equitable mortgage, and Jakeria Musa still continues in possession of the said deed. In January 1894, the defendants attempted to sell the premises to one Hassam Dada, and Jakeria Musa then gave notice of his claim as equitable mortgagee to the intending purchaser. Correspondence passed between the solicitors to the defendants and Jakeria Musa, and on the 2nd of February 1894, the former wrote to Jakeria Musa's solicitor that their client had made a false claim, and if the

1896.

Haji Essa
Sullimán
vs.
Dayabhai
Turmanandás.

1896.

Haji ESSA
SULLIMÁN
vs.
DAYABHAI
PURMANAN-
DÁS.

deed of mortgage was not returned and given up, "steps would be taken to compel its delivery." The bargain with Hassam Dada fell through, and, no steps or legal proceedings as threatened having been taken, Jakeria Musa continued in possession of the deed. Jakeria Musa must be therefore presumed to have a subsisting claim as an equitable mortgagee.

4. It is admitted that at the auction-sale which subsequently took place on the 6th of March 1894, no notice or information was given by the defendants or their auctioneer of the claim that had been set up by Jakeria Musa. Nor was plaintiff aware of this claim till some time later, when in response to a *bataki* beaten in the usual manner, Jakeria Musa again sent a notice of his claim through his solicitors to the Municipal Assessor. That claim was brought to the notice of the defendants, but they took no steps whatever, and simply relied on the correspondence that had previously passed.

5. Under section 55 of the Transfer of Property Act, I was of opinion that the expression "material defect in the property" included "material defect in title," and that under the last clause of the same section the omission to disclose any material defect in title was fraudulent. I held that any omission, *i.e.*, concealment or suppression of a material fact affecting the title made from mere inadvertence, or even from accident, should be treated as fraudulent under section 55, as that section did not require the active concealment of a fact provided for by section 17 of the Contract Act. I was of opinion that all omissions to disclose a material defect, whether through carelessness or design, were to be considered fraudulent so as to avoid the contract at the option of the purchaser (see Pollock on Fraud, p. 98). The value of the premises being Rs. 2,900, and the alleged claim of Jakeria Musa having been over Rs. 500, the disclosure of the claim made by him, if made at the time of the auction-sale, might have induced the purchaser to avoid the contract on account of the alleged incumbrance and apprehended litigation, or it might probably have induced him to offer a lower value. On the authority of *Peary Mohan vs. Abdul Subhan*,⁽¹⁾ I held that the neglect on the part of the defendants to disclose the fact of the claim of Jakeria Musa was a fraudulent concealment and vitiated the con-

(1) 7 Cal. W. R. 258.

tract. I may be permitted to say I also relied on *Waddell vs. Wolfe*,⁽¹⁾ *Mostyn vs. The W. Mostyn Coal Company*,⁽²⁾ *Nottingham Patent Brick Company vs. Butler*,⁽³⁾ and also on *Gajapathi vs. Alagia*⁽⁴⁾ and *Morgan vs. The Government of Haidarabad*.⁽⁵⁾ I passed a verdict for plaintiff for Rs. 584-8-0 and costs.

6. As the defendants' solicitor proposed questions (4) and (5), it is necessary to state that during his lifetime the testator Dayabhai had filed a suit, No. 170 of 1875, on the said mortgage in the High Court, and under a decree obtained therein the premises in question were sold, and Dayabhai purchased the same with the leave of the Court, and obtained a certificate of sale dated the 2nd August 1887. Amongst the documents of title now in the possession of defendants, the said mortgage-deed of the 4th January 1871 has been missing, and it is now in the possession of Jakeria Musa. No evidence whatever was given by the defendants to show that Jakeria Musa was aware of the existence of the High Court suit, or of the decree, or of the subsequent purchase of the property under the said certificate of sale by the testator Dayabhai. Nor was the point raised by question (5) argued and pressed as therein suggested.

7. At the request of the defendants' solicitor, I beg respectfully to submit the following questions for the opinion of their Lordships:

(1) Whether under the circumstances of the case, the alleged claim of Jakeria Musa amounts to a "material defect in the property" in terms of section 55 of the Transfer of Property Act?

(2) Whether having regard to the conditions of sale (Exh. D.) the defendants were bound to remove the claim put forward by the said Jakeria Musa?

(3) Whether the defendants were bound to disclose to the plaintiff before the auction-sale the claim made by the said Jakeria Musa, and whether by reason of the non-disclosure of the said claim, the plaintiff is entitled to rescind the contract and claim his deposit with interest and costs?

(4) Whether the mortgage deed dated 4th January 1871, which is in the possession of Jakeria Musa, is a document by the

1896.

HAJI ESSA
SULLIMÁN
vs.
DAYABHAI
PURMANAN-
DÁS.

(1) L. R. 9 Q. B. 515.

(3) L. R. 16 Q. B. D. 778.

(2) L. R. 1 C. P. D. 145.

(4) I. L. R. 9 Mad. 89.

(5) I. L. R. 11 Mad. 419.

1896.

HAJI ESSA
SULLIMÁN
vs.DAYABHAI
PURMANAN-
DÁS.

deposit of which an equitable mortgage of the property could be created, having regard to the fact that a decree in High Court suit No. 170 of 1875 was passed upon the said mortgage and a certificate of sale issued to the said Dayabhai on his purchasing the said property under the said decree?

(5) Whether having regard to the said decree and certificate, the said mortgage is extinguished so as to cease to be a document of title to the property by the deposit of which an incumbrance could be created?

Lowndes for defendants.

Scott for plaintiff.

JUDGMENT OF THE HIGH COURT (Farran, C.J., and Tyebji, J.).

This is a reference to the High Court under section 69 of the Small Cause Courts Act (XV. of 1882) by the learned Second Judge, Mr. Rastamji Merwanji Patell. The first question we have to answer is, whether, under the circumstances stated in the case submitted to us, the alleged claim of Jakeria Musa amounts to a material "defect in the property" within the meaning of section 55 of the Transfer of Property (Act LV. of 1882). This question subdivides itself into two questions:

(a) Whether the expression "defect in the property" includes defects not in the estate itself, but in the title to such estate? and

(b) Whether, if so, the alleged defect in this case, namely, the existence of the mortgage deed dated the 4th January 1871 and its alleged deposit with the said Jakeria Musa by way of an equitable mortgage for Rs. 500, is "material" within the meaning of the same section?

The learned Second Judge has held that a defect in the property includes a defect in title under section 55, and although this construction was not pressed upon us by Mr. Scott, who argued the case on behalf of the plaintiff before us, we still think it our duty to consider and decide the question, as it has been specially put to us by the learned Judge.

Although at first sight it seems somewhat straining the meaning of the words "defects in the property" to hold that they include defects in the title to the property, yet after a careful consideration

of the whole of section 55 and other sections of the Act bearing on the question, we have come to the conclusion that the construction put upon the words by the learned Second Judge is correct.

Mr. Justice Shephard and Mr. Brown in their learned commentary upon the Transfer of Property Act, page 115, say: "There may be some doubt whether defects, not in the estate itself, but in the title, are intended to come within the clause, whether the duty imposed on the vendor relates to matters other than those of the class referred to in section 108. It is apprehended, however, that the term is not to be so restricted, and that an omission to disclose flaws in the title or incumbrances, which the purchaser has no apparent means of discovering, might equally be fraudulent under the section. In England positive fraud is not necessary to entitle a purchaser to relief; it is enough if he proves concealment on the seller's part of a material defect in the title. And it is not competent to a vendor, failing to disclose such a defect, to put forward conditions of sale which are to force a bad title upon his purchaser."

We consider that the above statement of the law is borne out by the English authorities. In Sugden's Law of Vendor and Purchaser (14th Ed.), p. 5, the doctrine is broadly stated in these terms: "The same rule applies to incumbrances and defects in the estate itself. The vendor is bound to deliver to the purchaser the instrument by which the incumbrances were created, or on which the defects arise, or to acquaint him with the facts if they do not appear on the title deeds. If a seller knows and conceals a fact material to the title, relief cannot be refused to the purchaser." Again, in Dart, 105, we find it laid down: "As to incumbrances and defects in title, a vendor, so far as his *prima facie* liability in this respect is not negatived or restricted by the terms of the contract, must produce to the purchaser all such documents of title in his possession or power as are necessary, and must inform him of all material facts not apparent thereon." In *Mostyn vs. West Mostyn Coal and Iron Company*,⁽¹⁾ Mr. Justice Brett says: "Now although there is a statement that plaintiff knew and defendant did not and could not know of the want of title to part of the demised premises, and that such a want of title was in respect of a part material to the enjoyment of the rest, still there is no allegation of

1896.

HAJI ESSA
SULLIMAN
vs.
DAYAHAI
PURMANAN-
DAS.

(1) L. R. 1 C. P. D. at page 151.

1896.

Haji Essa
Sullimán
vs.
Dayabhai
Purmanan-
Dás.

anything amounting to fraud on the part of the plaintiff. The question is whether a Court of Equity would, if a bill had been filed containing a statement of these facts, set aside the lease. If so, then there is a good *prima facie* answer to the action. I think the passage from Sugden's Vendor and Purchaser (14th Ed.), p. 246, and the case of *Edwards vs. McLeay*,⁽¹⁾ are authorities to show that equity in such a case as this will set aside the transaction." In *Edwards vs. McLeay*,⁽¹⁾ the Master of the Rolls, Sir William Grant, says: "Whether it would be a fraud to offer as good a title which the vendor knows to be defective in point of law it is not necessary to determine, but if he knows of and conceals a fact material to the validity of the title, I am not aware of any principle on which relief can be refused to the purchaser." Again, Archibald, J., at p. 153, said: "Whether there has been concealment of a material fact, though it may not amount to affirmative fraud and though there has been no eviction, a Court of Equity will set aside the lease." In *Nottingham Patent Brick and Tile Company vs. Butler*,⁽²⁾ Lord Esber, M.R., said: "It seems to me an astounding proposition that a vendor can by means of such conditions of sale force upon a purchaser a defective title, even though he (the vendor) knew the defect. Now that Butler did know of the defect seems to have been assumed by Wills, J.; if you treat him as dealing himself with the purchaser he knew of the defect, and if the conversation between his solicitor and the plaintiff's solicitor, at which he was present, amounted to nothing at all, then it comes to this that he, knowing the defect, by his agent put forth the conditions of sale. If that is so, the case is absolutely within the authority of *Haywood vs. Mallalieu*⁽³⁾ as it seems to me. It is impossible for a vendor knowing of a defect in his title, either by himself or his agent, to put forward conditions of sale which are to force upon a purchaser a bad title, of which he knew, but which he did not disclose. A Court of Equity would not be of much use if it could not meet such a case as that, and it seems to me clear that a Court of Equity would never have enforced a contract under such circumstances."

The case of *Gajapathi vs. Alagia*⁽⁴⁾ is an illustration of the same doctrine as applied by the High Court of Madras in India. There,

(1) 2 Sw. 287.

(2) L. R. 16 Q. B. D. at page 786.

(3) L. R. 25 Ch. D. 357.

(4) I. L. R. 9 Mad. 89.

a Hindu had executed a sale-deed of a house in the mofussil. The deed contained no covenant for title. The purchaser having been evicted from a portion of the house under a decree of which the vendor was aware at the time of the sale sued the vendor for damages. The Munsiff decreed the claim on the ground that the vendor had fraudulently concealed the existence of the decree. On appeal the District Judge reversed this decree, holding that as the purchaser had not insisted on a covenant of title, he must be held to have accepted all risks. It was, however, held by Hutchins and Parkar, JJ., that, if there had been fraudulent concealment as alleged, the purchaser was entitled to damages. At page 91 the learned Judges say that "it appears to us that if the respondent did conceal from the appellant the existence of the decree for partition, he was guilty of a fraudulent concealment and is bound to refund the purchase-money. In the absence of the positive law, we are bound in this country to apply the principles of good conscience and equity. Even under English law the vendor is bound to make compensation for a fraudulent concealment of a defect in the title, or of any incumbrance. Although a purchaser cannot ordinarily obtain relief against a vendor for any incumbrance or defect in the title to which his covenants do not extend, an exception is made to this rule in the case of a vendor or his agent suppressing an incumbrance or a defect in the title. Even though the purchase-money has been paid and the conveyance executed by all the parties, yet if the defect do not appear on the face of the title-deeds and the vendor was aware of the defect, and concealed it from the purchaser, he is in every such case guilty of a fraud, and the purchaser may either bring an action on the case or file his bill in equity for relief." Again, in *Pearee Mohun Soor vs. Abdul Sobhan*,⁽¹⁾ it was held by Trevor and Glover, JJ., that where a vendor knowing that he had no right or title to property, or being cognizant of the existence of incumbrances or of latent defects materially lowering its value, sold it and neglected to disclose such defects of the purchaser, that there was a fraudulent concealment vitiating the contract.

Again, under the Specific Relief Act (I. of 1877), sections 17 and 18, a contract of selling or letting is declared not to be enforceable in favour of a vendor or lessor who knowing himself to have no

1896.

Haji Essa
Sullimán
vs.
Dayabhai
Purmanan-
dás.

(1) 7 Cal. W. R. 258.

1896.

HAJI ESSA
SULLIMÁN
vs.
DAYABHAI
PURMANAN-
DÁS.

title to the property has contracted to sell or let the same, and in section 18, clause (d), it is laid down that "when the vendor or lessor sues for specific performance of contract, and the suit is dismissed on the ground of his imperfect title, the defendant has a right to a return of his deposit with interest and costs." Further, it is to be observed that in section 108 of the Transfer of Property Act (IV. of 1882) the duty of the lessor is confined to disclosing the defects "in the property with reference to its intended use," which latter words are obviously inserted to exclude defects in the title of the lessor being disclosed to the lessee. Moreover, clause 5 of section 55 of the Transfer of Property Act, which deals with the corresponding duty of the buyer, in express words casts upon him the duty of disclosing to the seller "any fact as to the nature or extent of the seller's interest in the property of which the buyer is aware, but of which he has reason to believe that the seller is not aware, and which materially increases the value of such interests." It is difficult to believe that the Legislature would have cast upon the buyer the duty of communicating facts relating to the seller's title without casting a similar duty upon the seller himself. On the whole we believe that clause 1 (a) of section 55 casts upon the seller the duty of disclosing to the buyer all defects, whether in the title or in the estate itself, while clause 5 (a) casts upon the buyer only the duty of communicating facts relating to the nature and extent of the seller's interest, and not relating to the property itself. For the reasons above given, therefore, we are of opinion that the words "defects in the property" include defects in the title.

The next question is whether the alleged claim is a "material" defect, the non-disclosure of which vitiates the whole contract. We are of opinion that, under the circumstances of the case, the alleged claim does not constitute a material defect, as, even if well founded, it is a defect which the vendor could readily remove, and the conditions of sale bind him to do so, and it bears only a small proportion to the purchase-money, out of which it can be cleared by the purchaser himself.

The 2nd question is, whether, having regard to the conditions of sale, the defendants were bound to remove the claim put forward by the said Jakeria Musa. We answer this question in the affirmative. The defendants were bound to remove the claim if requested

so to do by the plaintiff, and, if they refused, the plaintiff was entitled to rescind.

The 3rd question is whether the defendants were bound to disclose to the plaintiff before the auction-sale the claim made by the said Jakeria Musa, and whether, by reason of the non-disclosure of such claim, the plaintiff is entitled to rescind the contract, and claim his deposit with interest and costs. We have already answered this question so far as section 55 of the Transfer of Property Act is concerned. As regards the Indian Contract Act the answer depends upon the inference to be drawn upon the facts. If the non-disclosure amounts to fraud within the meaning of section 17, Indian Contract Act, the plaintiff would be entitled to rescind the contract under section 19 of that Act. Under the circumstances of this case, however, we do not think that such fraud can be inferred as a conclusion of law, and we therefore answer this question in the negative.

The 4th question is whether the mortgage-deed, dated the 4th January 1871, which is in the possession of Jakeria Musa, is a document by the deposit of which an equitable mortgage of the property could be created having regard to the fact that a decree in High Court suit No. 170 of 1875 was passed upon the said mortgage, and a certificate of sale issued to the said Dayabhai on his purchasing the said property under the said decree. The answer to this question depends upon whether or not the alleged deposit was made before the decree.* If it was, the deposit would effect, of course, an equitable mortgage; and, even if made after the decree, it would be equally effectual, if the deposit were made without informing the intended equitable mortgagee of the decree.

The 5th question is, whether, having regard to the said decree and certificate, the said mortgage is extinguished so as to cease to be a document of title, by the deposit of which an incumbrance could be created. Our observations on the 4th question sufficiently answer this question also.

1896.

HAJI ESSA
SULLIMÁN
VS.
DAYABHAI
PURMANAN-
DÁS.

1896.
Jan. 24.

HAJI SULEMA'N HAJI SUMAR, PLAINTIFF, versus NARONDA'S
HARI, TRADING IN THE NAME OF HARI DEWSEY, DEFENDANT.

Contract—Sale of goods for forward delivery—Agreement by buyer to pay earnest money—Condition precedent.—Indian Contract Act (IX. of 1872) sections 39, 54, 55.

By a contract dated 6th March 1894, the plaintiff agreed to buy from the defendant 100 bales of gunny bags, deliverable in four monthly shipments from May to August 1894. The contract contained this clause:—"The purchaser shall pay to the seller earnest money at the rate of Rs. 4 per bale . . . the interest thereon shall be paid by the seller at eight annas per cent. And on the same day that the lot or instalment is delivered the earnest money for that number of bales shall be given (or re-paid) by the seller to the buyer, or the buyer of goods shall deduct the same from the amount (or value) that he pays." The plaintiff failed to pay the earnest money and after giving him formal notice the defendant on the 4th June 1894 cancelled the contract. In a suit by the plaintiff to recover damages for the failure of the defendant to deliver the goods,

- Held*, (1) that the condition was such as a Court of Law would recognise ;
(2) that it was not void for vagueness or uncertainty ;
(3) that performance of the condition was a condition precedent to the right of the plaintiff to claim performance of his contract ;
(4) that the non-performance of the condition entitled the defendant to rescind the contract ;
(5) that a tender by the plaintiff of the full value on the respective due dates would not cure the defect of non-payment of the earnest money.

CASE stated for the opinion of the High Court under section 69 of the Presidency Small Cause Courts Act by Rastamji Merwanji Patell, Second Judge.

1. In this case plaintiff sought to recover Rs. 689-7-8 damages for breach of a contract to deliver to him 100 bales of gunny bags. The contract was dated 6th March 1894, and was for forward delivery in four shipments from the month of May to August following. The due date for the delivery of the first shipment was the 25th June. The chief point on which the parties were at issue depended on the construction and the legal effect of the first of the conditions printed on the back of the said contract. "I.—The purchaser shall pay to the seller earnest money at the rate of Rs. 4 per bale ; . . . the interest thereon shall be paid by the seller at eight annas per cent. And on the same day that the lot or instalment is delivered the earnest money for that number of bales shall be given (or re-paid) by the seller to the buyer, or the buyer of goods shall deduct the same from the amount (or value) that he pays." I found, on the

evidence before me and from the admitted correspondence between the parties, that the plaintiff failed to pay the earnest money, either within a reasonable time, which I was of opinion would be three to four days from the making of the contract, or when formally called upon to do so by the defendant by a written notice dated the 29th of May 1894. I found that the plaintiff's non-performance of this condition was a breach of contract on his part which entitled the defendant to rescind the contract, as he did by his letter of the 4th June following, and that the defendant was released from his obligation to perform his part of the contract under sections 39 and 54 of the Indian Contract Act (IX. of 1872).

2. I was also of opinion that section 55 should be read with section 46 of the same Act, and on the question as to legal effect of the payment of earnest I relied on the case of *Howe vs. Smith*,⁽¹⁾ and particularly on the judgment of Fry, L.J., at page 101. The chief contention of the plaintiff's counsel was that the condition in question was an independent condition, that did not go to the root of the case, and could have been compensated in damages. But I was of opinion that the breach of that condition could not be compensated in damages, that it was in the nature of mutual conditions, and that in the order of precedence the plaintiff ought to have first performed his condition and paid the earnest before he could call upon the defendant to deliver the goods on the tender of their full value. The plaintiff's counsel raised the following questions:

(1) Whether the first condition on the back of the written contract is such as a Court of Law should recognise?

(2) Whether the condition is void for vagueness and uncertainty?

(3) Whether the performance of that condition is a condition precedent to the right of the plaintiff to claim performance of his contract?

(4) Whether the non-performance of the condition entitled the defendant to rescind or cancel the contract, or to decline to perform his part of the contract?

(5) Whether the tender of full value on the respective due dates of delivery cured the defect, if any, of the non-payment of the earnest money?

1896:

Haji Sule-
mán Haji
Sumar
vs.
Narondás
Hari.

(1) L. R. 27 Ch. D. 89.

1896.

Haji Sule-
mán Haji
sumar
vs.
Narondás
hari.

3. I was of opinion that the 1st, 3rd, and 4th questions be answered in the affirmative and the 2nd and 5th in the negative. I thereupon dismissed the suit with costs contingent on the opinion of the High Court.

4. The plaintiff's counsel has requested the Court to submit the abovementioned questions to the High Court, and the defendant's solicitor has raised a further question :

(6) Whether any valid and binding sale of the goods mentioned in the said contract can be said to have been effected, unless and until the earnest stipulated in the contract was paid ?

I therefore respectfully beg to submit the said six questions for their Lordships' opinion.

JUDGMENT OF THE HIGH COURT (Farran, C.J., and Strachey, J.).

We answer questions (1), (3), and (4) in the affirmative and questions (2) and (5) in the negative. It is not necessary to answer the 6th question.

1896.

Jan. 24.

TEJPAR DEVCHAND AND ANOTHER, PLAINTIFFS, versus
MAHOMED JAMAL AND OTHERS, DEFENDANTS.*

Arbitration—Application to file award—Objection to the factum and validity of submission and award—Civil Procedure Code (XIV. of 1882) sections 520, 521, 525, 526—Practice—Procedure.

Where an application was made to file an award under sections 525 and 526 of the Code of Civil Procedure (Act XIV. of 1882) and objections, not merely frivolous or colourable, were taken by the opposite party to the factum and validity of the submission and the award,

Held, that the Court was not bound to go into evidence on the objections raised, but was justified in refusing to file the award and in referring the parties to a substantive suit.

CASE stated for the opinion of the High Court under section 69 of the Presidency Small Cause Courts Act (XV. of 1882) by C. W. Chitty, Chief Judge.

1. This was a suit brought by the plaintiffs, father and son, against the three defendants to recover Rs. 1,228-8-0 as damages for breach of contract to deliver cotton. The first defendant is brother of the second and son of the third defendant.

* Reported at I. L. R. 20 Bom. 596.

2. On the suit being called on before me for hearing on the 8th August 1895, the plaintiffs' solicitor presented an application stating that the matters in question in the suit had been referred to the arbitration of one Purshotam Sivji, who had made his award, and asking that the submission-paper and award might be recorded as a settlement of the suit under section 375 of the Code of Civil Procedure, or that in the alternative the award might be filed under section 525.

3. After hearing the solicitor for the plaintiffs and counsel for the first defendant, and the pleader for the second and third defendants, I took time to consider the point. On the 12th August I delivered judgment to the effect that the submission-paper and award could not possibly be recorded as a compromise of the suit under section 375 for many reasons, but more especially because (1) the first plaintiff and second and third defendants were no parties to the alleged arbitration and were not bound by it, and (2) it would preclude the defendants from raising any objections they might have to the validity of the award. I was of opinion that the plaintiffs were entitled to a notice under section 525 calling on the first defendant to show cause why the award should not be filed.

4. I should mention that the submission, although in the body of it purporting to be made by the three defendants, was only signed by the first defendant, the second plaintiff being the only signatory on the part of himself and his father. The award purports to be made against all three defendants.

5. In accordance with my decision a notice was issued against the first defendant, and on the 26th August it came on for hearing. The first defendant by his counsel raised the following objections: (1) that the matters in dispute were not duly or legally referred to arbitration, (2) that the submission, if any, was imperfect and illegal, (3) that what was sought to be filed was not an award, (4) that the submission, if any, was revoked before the making of the alleged award, (5) that the arbitrator was guilty of misconduct, and (6) that the award was made without any investigation.

6. After hearing the arguments on part of the first defendant and the plaintiffs, I delivered judgment, and held, on the authority of the cases cited, that I was justified in refusing to file the award and in referring the plaintiffs to a substantive suit on the award.

1896.

TEJPAR
DEVCHAND
vs.
MAHOMED
JAMAL.

1896.

TEJPAR
DEVCHAND
vs.
MAHOMED
JAMAL,

The objections taken by the first defendant appeared to me serious and substantial and to go to the very root of the matter as to whether there had been any binding submission or award. They did not appear to me to be merely frivolous or colourable objections raised for the purpose of hampering the plaintiffs. The cases on which I relied were *Samal Nathu vs. Jaishunker Dulsukhram*,⁽¹⁾ *Hirjibhai vs. Jamsetji*,⁽²⁾ *Venkatesh Khandu vs. Chanappavda*,⁽³⁾ and *Bijadhur vs. Monohur*.⁽⁴⁾

7. I am aware that it was decided in the case of *Dandekar vs. Dandekars*⁽⁵⁾ that to show cause means not merely to allege but prove it. But I was of opinion that that case did not preclude me from exercising the discretion which would appear to be left to the Judge by sections 525 and 526. Those sections provide no procedure for an elaborate investigation into difficult questions of law and fact.

8. As I was delivering judgment, and had in fact expressed my opinion, the plaintiffs' solicitor interrupted me, and asked for a case to be stated. Though, technically speaking, he was too late in his application, I do not wish to deprive the plaintiffs of the satisfaction of obtaining the higher opinion. I therefore submit these questions for the consideration of their Lordships:

(1) Whether after issuing a notice under section 525 the Court was bound to go into evidence on the objections raised?

(2) Whether, under the circumstances above stated, I was justified in refusing to file the award and in referring the plaintiffs to a substantive suit?

9. The plaintiffs have deposited in Court Rs. 68, the first defendant's costs of the day, and Rs. 50 to meet the costs of reference.

Raikes for plaintiffs.

Lang (Advocate General) for defendants.

JUDGMENT OF THE HIGH COURT.

FARRAN, C.J.—The questions submitted to us upon this reference arise under the following circumstances:—The plaintiffs, who are partners, filed a suit in the Small Cause Court to recover

(1) I. L. R. 9 Bom. 254,

(2) P. J. 1890. p. 250.

(3) I. L. R. 17 Bom. 674.

(4) I. L. R. 10 Cal. 11.

(5) I. L. R. 6 Bom. 663.

damages from the defendants for breach of a contract to deliver cotton. The defendants were three partners carrying on business in the name of Mahomed Jamal, which was also the name of the first defendant. On the suit being called on the plaintiffs made an application to the Court stating that the suit had been privately referred to arbitration, and that an award had been made, and (*inter alia*) asking that the award might be filed under sections 525 and 526 of the Civil Procedure Code. It then appeared that the alleged submission had been signed by the defendant Mahomed Jamal alone, although in its body it purported to be made by all the three defendants. The award purported to be made against all the three defendants. The learned Judge directed a notice to issue under section 525 to the defendant Mahomed Jamal. That defendant appeared and, while admitting his signature to the submission-paper, raised several objections as to its legal validity and its binding effect upon him and as to the award, of which it is sufficient to say, that to the Judge they did not appear to be merely frivolous or colourable objections raised for the purpose of hampering the plaintiffs. The learned Judge considering that he had a discretion in the matter, and that sections 525 and 526 provided no procedure for an elaborate investigation into difficult questions of law and fact, refused to file the award and referred the plaintiffs to a regular suit. The 5th and the 6th objections related to the conduct of the arbitrators. The rest were objections to the validity of the submission and award independent of the character of the arbitrator's proceedings.

1896.

TEJPAR
DEVCHAND
vs.
MAHOMED
JAMAL.

The questions submitted are :

(1) Whether after issuing a notice under section 525 the Court was bound to go into evidence on the objections raised ?

(2) Whether, under the circumstances stated, the Judge was justified in refusing to file the award and in referring the plaintiffs to a substantive suit ?

The decisions of this Court upon which the learned Judge of the Small Cause Court relied are *Samal Nathu vs. Jaishankar Dalsukhran*,⁽¹⁾ *Hirjibhai vs. Jamsetji*,⁽²⁾ and *Venkatesh vs. Chanappavda*,⁽³⁾ while he distinguished *Dandekar vs. Dandekars*.⁽⁴⁾ The former

(1) I. L. R. 9 Bom. 254.

(2) P. J. 1890. p. 250.

(3) I. L. R. 17 Bom. 674.

(4) I. L. R. 6 Bom. 663.

1896.
 TEJPAR
 DEVCHAND
 vs.
 MAHOMED
 JAMAL.

judgments have been referred to with approval by three of the five Judges who decided the Full Bench case of *Surjan Raot vs. Bhikari Raot*.⁽¹⁾ The Full Bench unanimously ruled in that case that, when an application is made to a Court for filing a private award, and objections are raised, and the objections are such as fall within section 521 of the Civil Procedure Code, the Court is not bound to hold its hand and reject the application, but it is the duty of the Court to enquire into the validity of the objections raised and thereupon to determine whether the award should be filed or not. Three of the Judges, however, further expressed their opinion, that, when on such an application an objection is taken that the matter in dispute were never referred to arbitration, and is, therefore, not on one of the grounds mentioned in section 521, the Court has no jurisdiction to deal with it but should reject the application and refer the parties to a regular suit. The objections taken to the award in *Samal Nathu vs. Jaishankar*⁽²⁾ and *Hirjibhai vs. Jamsetji*⁽³⁾ were objections which went to the root of the submission, while those taken in *Dandekar vs. Dandekars*⁽⁴⁾ were objections to the conduct of arbitrators, and such as clearly fell within sections 520 and 521 of the Code. In the present case the main objections were of the former character, and the Judge rightly considered that the case was governed by *Samal Nathu vs. Jaishankar Dalsukhram*.⁽²⁾

The Full Bench Division of the Allahabad High Court in *Amrit Ram vs. Dasram*,⁽⁵⁾ which gives a more extended application to the words of section 526 than has hitherto been usually applied to them, has, however, been cited to us, and we are asked, upon the reasoning contained in that judgment, to dissent from the ruling of our own Court in *Samal Nathu vs. Jaishankar*,⁽²⁾ followed as it has been in *Hirjibhai vs. Jamsetji*⁽³⁾ and *Venkatesh vs. Chanapgavda*,⁽⁶⁾ and the question before us is, whether we ought to do so, and refer the matter to a Full Bench. Before considering it, I may say that I entirely agree with the ruling of the Full Bench of the Calcutta High Court in *Surjan Raot vs. Bhikari Raot (supra)*, to which I have referred. It appears to me that the Legislature intended that the Court when dealing with an award made without

(1) I. L. R. 21 Cal. 213.

(3) P. J. 1890. p. 250.

(5) I. L. R. 17 All. 21.

(2) I. L. R. 9 Bom. 254.

(4) I. L. R. 6 Bom. 663.

(6) I. L. R. 17 Bom. 674.

the intervention of a Court should institute the same enquiries, and that the orders made upon such enquiry should be final or be subject to correction by a Court of Appeal in the same way and to the same extent only as if the award had been made under an order of reference by the Court, and that they have expressed that intention with clearness in the 526th section of the Code. The only difference between the procedure in the two cases is that the enquiry in the latter case takes place after the award has been filed *ex-parte*, while in the former it takes place before the filing.

I think, however, that notwithstanding the decision in *Amrit Ram vs. Dasrat Ram*,⁽¹⁾ we ought not to depart or dissent from the rulings of our Court which I have mentioned. The enquiry which the Legislature has directed the Court to embark on by section 525 and 526 of the Code is, I cannot doubt, an enquiry such as the Court dealing with objections made under section 521 could be called upon to make. The latter enquiry from the very nature of the case cannot embrace an enquiry into the factum or validity of the submission or order of reference. It is in terms confined to events taking place subsequent to such order. The existence of such an order is assumed as a fact. So too the existence of a submission appears to me to be assumed by the Legislature in sections 525 and 526, and the Court is only directed to enquiry into events subsequent to such submission. The enactment that, if "no ground such as is mentioned or referred to in section 520 or 521 be shown against the award the Court shall order it to be filed," read in its ordinary sense, means, I think, "if no ground of the nature of those mentioned or referred to in section 520 or 521 be shown," and it is only by a somewhat forced interpretation of the section that it can bear the meaning attributed to it by the Allahabad High Court. If it were necessary to read it in that broad sense in order to give effect to a plain intention of the Legislature, I should not hesitate so to read it, but I see no reason for straining the words in the present instance. The reasoning of the Court in *Samal Nathu vs. Jaishankar*⁽²⁾ goes far to show that the intention of the Legislature is not that which such an interpretation would attribute to it. But whether that be so or not, I think that the present is peculiarly a case to which the maxim "*stare decisis*" is applicable.

1896.

TEJPAR
DEVCHAND
vs.
MAHOMED
JAMAL.

(1) I. L. R. 17 All. 21.

(2) I. L. R. 9 Bom. 254.

1896.

TEJFAR
DEVCHAND
VS.
MAHOMED
JAMAL.

It is not a case of declining jurisdiction, but of holding that a particular procedure is not applicable to circumstances apparently not contemplated by its framers. I would answer both questions accordingly, the first in the negative and the second in the affirmative. Costs of reference costs in the application.

STRACHEY, J.—I agree with the learned Chief Justice that we ought to follow the decisions of this Court in *Samal Nathu vs. Jai-shunkar Dalsukhram*,⁽¹⁾ *Hirjibhai vs. Jamsetji*,⁽²⁾ and *Venkatesh vs. Chanappavada*.⁽³⁾ I think with West, J., in the first of these cases and with Prinsep, J., in *Surjan Raot vs. Bhikari Raot*,⁽⁴⁾ that sections 525 and 526 of the Code are obscure on the question which we are considering. To such a state of things the rule of “*stare decisis*” is applicable. We ought to follow the decisions of our own Court, unless we are clearly satisfied that they are wrong, and I certainly do not pretend to be so satisfied in the present case.

If the question were *res integra*, I think that there would be strong reasons for adopting the conclusion arrived at by the Full Bench of the Allahabad High Court in *Amrit Ram vs. Dasrat Ram*.⁽⁵⁾ It is common ground that sections 525 and 526 apply only when there has been a submission to arbitration without the intervention of a Court of Justice, and when an award has been made thereon. It appears to me that the effect of the sections read together is that where there has been such a submission and award, any person interested in the award has an absolute right to have it filed unless the other parties show against it some ground such as is mentioned in section 520 or 521. The right to have the award filed, except where such ground is shown, depends exclusively upon the conditions specified in section 525—a submission, an award, and an interest in the award,—and cannot be denied to any one who shows that those conditions exist. It seems to follow that a person claiming the right is entitled to prove it if it is denied; and that to say that the right exists where there has been a submission and an award, but that upon a mere denial of either the Court is not to enforce it, is very like a contradiction in terms. The absence of challenge or

(1) I. L. R. 9 Bom. 254.

(2) P. J. 1890. p. 250.

(3) I. L. R. 6 Bom. 663.

(4) I. L. R. 21 Cal. 213.

(5) I. L. R. 17 All. 21.

denial is not specified as a condition of the right. The sections do not say that, where there is an admitted submission, and an admitted award, any person admittedly interested in the award has a right to have it filed unless cause is shown to the contrary. They say that, where a matter has been referred to arbitration out of Court, and an award has been made, the right of a person interested in the award to have it filed, subject to certain objections, follows. Apart from the decisions I should have thought that a mere denial by the other parties could not, more than in any other case, destroy or defeat the right or prevent the party claiming it from proving the conditions upon which it depends. I should have thought that the effect of the denial would be to put the existence of the submission or the award in issue in the suit, in which, under the second paragraph of section 525, the applicant is plaintiff and the other parties defendants. Upon that issue it would be for the plaintiff to establish his right to have the alleged award filed by proving that there had been a submission and an award thereon in which he was interested. If he succeeded, then, in the absence of cause shown by the defendants upon any of the grounds mentioned in section 520 or section 521, the Court would be bound to order the award to be filed. It has been said that no provision is made for such an enquiry, but only for an enquiry into the matter referred to in sections 520 or 521. In *Micharaya Guruvu vs. Sadashiv Parama Guruvu*,⁽¹⁾ it was held by Turner, C.J., and Muthusami Ayyar, J., "that the power to file the award includes the power to enquire if there was a submission to arbitration." But even if the provisions giving the right to have the award filed do not imply a duty in the Court to decide, in the event of dispute, whether the right exists, is not such an enquiry in effect provided for by treating the application as a suit between the applicant and the other parties? According to Pethe-ram, C.J., in *Surjan Raot vs. Bhikari Raot*,⁽²⁾ "Everything which could be pleaded as an answer to an action to enforce the award could be pleaded as an answer to the petition to file the award." When once the submission and the award have been established by admission or proof, but not till then, the enquiry under section 526 appears to me to be co-extensive with that under section 522, in which, the reference having been made by the Court itself at an

1896.

TEJPAB
DEVCHAND
vs.
MAHOMED
JAMAL.

(1) I. L. R. 4 Mad. 319.

(2) I. L. R. 21 Cal. 223.

1896.

TEJPAR
DEVCHAND
vs.
MAHOMED
JAMAL.

earlier stage of the proceedings, there can, of course, be no question as to its existence. It has been said that an objection that there was no submission or no award may give rise to a long enquiry into difficult questions of law and fact, and that the Legislature cannot have intended that a subordinate Court should be competent to decide such questions upon an application to file an award and without appeal. An exactly similar objection was the ground upon which it was at one time held that the Court could not even consider the validity of cause shown against an award within the provisions of section 520 and 521, but must refuse to file the award, if such cause were merely alleged and not proved. See the judgment of Melvill, J., in *Dandekar vs. Dandekars*.⁽¹⁾ That objection is not now accepted as conclusive. Again, it is not clear that if a Court is competent under sections 525 and 526 to decide whether there was in fact a submission or an award, its decision upon the question is necessarily final. Upon the award being filed, judgment and decree according to the award follow, and under section 522 no appeal shall lie from such decree except in so far as the decree is in excess of or not in accordance with the award. But it has been held in several cases that section 522 pre-supposes the existence of a valid award as the basis of the decree, that it does not apply to a case in which there has been no award in law or in fact, and that the decree may be appealed against on that ground—*Suppu vs. Govindacharya*,⁽²⁾ *Debendra Nath Shaw vs. Aubhoy Churn Bagchi*,⁽³⁾—explaining the judgment of the majority of the Full Bench in *Sashti Charan Chatterji vs. Tarak Chandra Chatterji*,⁽⁴⁾ *Lachmandas vs. Brijpal*,⁽⁵⁾ *Bindessuri Pershad Singh vs. Janki Pershad Singh*,⁽⁶⁾ and *Joy Prokash Lall vs. Sheo Golam Singh*.⁽⁷⁾ In the last mentioned case it was held that an appeal would lie from a decree given in accordance with the award, where the objection was that all the parties to the suit had not agreed to the reference.

I agree with the learned Chief Justice that objections denying the existence of the submission and the award are not within the meaning of section 526 grounds such as are mentioned or referred

(1) I. L. R. 6 Bom. 663.

(2) I. L. R. 11 Mad. 85.

(3) I. L. R. 9 Cal. 905.

(4) 8 B. L. R. 315.

(5) I. L. R. 6 All. 174.

(6) I. L. R. 16 Cal. 482.

(7) I. L. R. 11 Cal. 37.

to in section 520 or section 521. If they were such grounds, it would under section 526 be for the defendant to prove them; but I think that here, as in other cases, where the right claimed by the plaintiff is denied, it is for the plaintiff to establish it by proving the existence of the conditions upon which it depends. Upon the issue being raised it is for him to prove that there has been a submission and an award, and it is not until this has been proved or admitted that the defendant under section 526 has to show against the award any of the grounds mentioned in section 520 or section 521. If this is so, the question whether there has been a submission and an award must be determined before any enquiry into objections under section 520 or section 521 can commence and therefore cannot fall within the scope of such objections. The Allahabad High Court express an opinion that an objection that there was no agreement to refer any question to arbitration would not only be *ejusdem generis* with, but would be one of, the precise grounds mentioned in clause (a) of section 520. But the meaning and scope of section 520 cannot be altered or enlarged by its incorporation in section 526; if in cases not falling within section 526, it does not include such an objection, it cannot do so in cases to which section 526 applies. That section 520, in cases not falling within section 526, assumes a reference to arbitration as an established fact, and does not include an objection that there has been no reference, follows not only from the fact that the reference, which it speaks of, has been made by the Court's own order, but from the provision for a remission of the award to the re-consideration of the arbitrators where any of the objections contemplated by the section are made good. That provision would be meaningless if one of those objections was that there had been no reference and no award to be remitted.

While these are the conclusions to which in the absence of authority I should probably have come, there is in this Court very strong authority for a more restricted reading of sections 525 and 526. I do not of course deny that there is great force in the reasoning of West, J., in *Samal Nathu vs. Jaishankar Dalsukram* and in the considerations referred to by the learned Chief Justice. Upon the construction of the sections there is, no doubt, much to be said for the view that the Legislature intended to provide a summary procedure for the enforcements of awards as to the existence of which

1896.

TEJPAR
DEVCHAND
VS.
MAHOMED
JAMAL.

1896.

TEJPUR
DEVCHAND
vs.
MAHOMED
JAMAL.

there was no substantial or *bond fide* dispute, and did not intend that in all cases, however contentious, a person seeking to enforce an award should be exempt from the necessity of bringing a regular suit and paying full court fees on his plaint. In these circumstances, following the previous decisions of this Court, I agree to the answers proposed by the learned Chief Justice to the questions referred.

1896.

Feb. 14.

MURJI LALA AND OTHERS, PLAINTIFFS, versus LINGU MAKAJI
AND ANOTHER, DEFENDANTS.*

Limitation—Limitation Act (XV. of 1877), section 19—Acknowledgment—Stamp Act (I. of 1879), section 34 and schedule I. art. 1—Evidence.

An acknowledgment of a debt fulfilling the conditions of article 1 of schedule I. of the Stamp Act (I. of 1879) cannot, if unstamped, be given in evidence "for any purpose," including the purpose of saving limitation.

CASE stated for the opinion of the High Court under section 617 of the Code of Civil Procedure (Act XIV. of 1882) by C. M. Cursetji, Third Judge.

1. The facts of the case are as under. This suit was filed on 18th September 1895, and is for Rs. 102, balance of an account for price of grain sold. The balance was adjusted, written out, and signed in plaintiffs' book by the defendants on the 21st October 1892. The defendant No. 1 alone appeared. He denied the adjustment and the signing of the account balance acknowledgment. He also pleaded limitation. I have found that the account was adjusted, and the acknowledgment of the balance was signed by the defendants, and on the point of limitation I have found that the claim is barred, as the said acknowledgment, on which this suit is brought, is not stamped in accordance with law, and is therefore inadmissible in evidence.

2. The accounts between the parties stood as follows:—At the beginning of Samvat 1947 the opening balance brought over from the preceding year was Rs. 105. Further supplies were debited up to Kartik Sud 11th, Rs. 7-2-0, whilst the credit side shows payments Rs. 9-2-0. Since Kartik Sud 11th Samvat 1947 the dealings have ceased entirely. On Kartik Sud 1st Samvat 1949 (21st October 1892), a balance of Rs. 102 is brought forward, the account is adjusted, and the defendants acknowledge the same by signing the balance entry.

* Reported at I. L. R. 21 Bom. 201.

3. A true copy of the acknowledgment is annexed. The following is a correct translation of the same :

"The account of two persons Kamati Lingu Makaji and Vithoba Lingu, Samvat 1949.

Rs. 102, Kartik Sud 1st, day of the week Friday. The old account being made up, and all the accounts being considered, Rs. 102 (in letters rupees one hundred and two) in full up to the 21st day of October 1892. After making up all accounts this writing is made out and given.

The signature of Kamati Lingu Makaji, Rs. 102 (in letters), his own hand.

The signature of Vithoba Lingu, Rs. 102 (also in letters), all accounts being made up, dated 21st October 1892, his own hand."

4. This acknowledgment not being stamped I have held is not admissible in evidence, and thus this suit must fail, as, but for such acknowledgment, the claim on the grain account would clearly be time-barred.

5. The plaintiffs' vakil, however, contends that this acknowledgment could be received in evidence under section 19 of the Indian Limitation Act to keep such claim alive, and relies on a recent decision of the Bombay High Court.⁽¹⁾

6. But for this ruling I should have had no hesitation in holding the present claim to be barred. A consideration of this decision has, however, left my mind in considerable doubt, and it is therefore with the very utmost diffidence I make this reference, and most respectfully submit that the point decided there deserves to be reconsidered. That matter came before the High Court on an application under the extraordinary jurisdiction, and in disposing of it, it appears that the Court has overlooked the express wording of section 34 of the Indian Stamp Act (I. of 1879), which strictly prohibits the reception of any instrument in writing not duly stamped in evidence "for any purpose."

7. It is not disputed that the acknowledgment in the present case comes within article 1 of schedule 1 of the Indian Stamp Act (I. of 1879). Under section 5 of the Act it must be stamped with an adhesive stamp of one anna. Not being so stamped this defect cannot be cured, and under section 34 of the Act it cannot be admitted in evidence "for any purpose."

1896.

MURJI LALA
vs.
LINGU
MAKAJI.

(1) I. L. R. 18 Bom. 614.

1896.

SURJI LALA

VS.

LINGU

MAKARI.

8. Under section 18 of the old Stamp Act, XVIII. of 1869, it was different; the stringent words "for any purpose" are wanting there, and documents not duly stamped under that Act have been admitted in evidence for collateral purposes.

9. In construing an Act regard must be had to the intention of the Legislature. From the addition of the words "for any purpose" in the later Act, which is the present law, the intention of the Legislature is clear, and expressly shows that documents which formerly found admission by a sort of side wind in the guise of collateral purposes, cannot now be admitted "for any purpose," except only as provided by section 34.

10. To allow the unstamped acknowledgment in this case to go in to show that the claim in respect of the old dealings is not barred, is to give it a legal operation manifestly in contravention of section 34, and to the detriment of the stamp revenue, seeing that documents of this nature are not infrequently unstamped, and have hitherto been excluded from taking effect so as to save a claim from the bar of limitation.

11. The collateral purposes for which documents not duly stamped are admitted in evidence are, I submit, confined to showing only fraud, illegality, crime, or something entirely *dehors* the main purport and effect for which the document is given or executed. There are numerous cases to show that this is so. Now the document in question here is undoubtedly an acknowledgment of an anterior debt, and such as operates to give it a new period of time. To admit it, though unstamped, for the very purpose of giving it this legal operation, cannot, I submit, be held to be admitting it merely for a collateral purpose *dehors* the intention for which it was made.

12. As regards admissibility in evidence for collateral purposes, documents unregistered, the registration of which is compulsory, and documents not duly stamped must, I think, be taken to stand practically on the same footing. In a recent case it was held that a document inadmissible for want of registration could not be admitted in evidence to show payment of interest under section 20 of the Indian Limitation Act, so as to save the claim in that case from being barred, *Venkaji Babaji Naik vs. Shidramapa Balapa Desai*.⁽¹⁾ By a parity of reasoning the unstamped acknowledgment in such

(1) I. L. R. 19 Bom. 663.

cases as the one now before me, must, I am of opinion, be excluded from saving an anterior debt that would otherwise be barred.

13. With these remarks I beg to submit the following question for the opinion of the Honourable the High Court :

“Whether an acknowledgment of a debt requiring to be stamped under the Indian Stamp Act of 1879, and not duly stamped, is admissible in evidence to save the debt from being barred under the provisions of section 19 of the Indian Limitation Act ?”

C. H. Setalvad (amicus curiæ) for plaintiffs.

Kazi Kabirudin (amicus curiæ) for defendants.

JUDGMENT OF THE HIGH COURT—(Sir C. Farran, C.J.,
Strachey, J., and B. Tyabji, J.)

We consider that the question submitted to us by this reference is in too general terms. Such questions should be confined to the point of law arising in the case, but as the form of the entry is given in the reference, and it was not disputed in the Small Cause Court that it was an acknowledgment within the meaning of article 1, schedule I, of the Indian Stamp Act (I. of 1879) we can, we think, treat the question as confined to acknowledgments falling within the scope of that article. As, however, in the arguments addressed to us by the learned counsel, who as *amici curiæ* appeared for the plaintiffs and defendants respectively, and to whom our acknowledgments are due, it was contended for the plaintiffs that the acknowledgment, which was sought to be put in evidence in the Small Cause Court, might be read as not fulfilling the requirements of the article, we should add that the acknowledgment in our opinion falls within the definition of an “acknowledgment of a debt” given in the article.

That being so, we are clearly of opinion that an acknowledgment like it fulfilling the conditions of article 1 of the schedule cannot be given in evidence “for any purpose.” The words of section 34 of the Act (I. of 1879) appear to us free of ambiguity, and to prevent an instrument, which is chargeable with a one anna stamp, and which cannot be admitted on payment of a penalty, from being admitted in evidence “for any purpose,” including the purpose of saving limitation. The insertion of the italicised words in the later Act, after it had been held under the former Act (XVIII. of

1896.
MURJI LALA
VS.
LINGU
MAKAJI.

1896.

MURJI LALA
VS.
LINGU
MAKAJI.

1869), section 18, which did not contain them, that unstamped documents could be admitted in evidence for a collateral purpose, renders this, we think, free from doubt, and if the decision in *Fatechund vs. Kisan*⁽¹⁾ was intended to decide the contrary, we feel unable to agree with it. We are not however satisfied that such is the necessary meaning of that decision. It will be seen from a reference to the facts that the Subordinate Judge, who heard the case, was of opinion that the acknowledgment there in question was not intended to supply evidence of the debt, while it does not appear what view the District Judge took of the document. The decision of the High Court would in our view be in accordance with the provisions of the Stamp Act if it took the same view of the instrument as the Subordinate Judge. There are doubtless expressions in the judgment as reported which show that the Court went further, but the omission of all reference to the words in section 34 of the Stamp Act—"No instrument shall be admitted in evidence for any purpose"—leads to the inference that the reporter did not correctly apprehend or reproduce the meaning of the learned Chief Justice. In each case the instrument of acknowledgment must be carefully examined in connection with the surrounding circumstances to ascertain whether it has been signed in order to supply evidence of the debt: *Binja Ram vs. Rajmohun Roy*⁽²⁾ and *Bishamber vs. Naval Kishore*.⁽³⁾ Upon the result the decision as to the admissibility or non-admissibility of the unstamped acknowledgment will depend. We answer the question proposed to us in the negative.

1896,
Feb. 27.

NAOROJI NUSSERWANJI THUNTI, PLAINTIFF, VERSUS KAZI
SIDICK MIRZA KAZI AHMED MIRZA, DEFENDANT.*

Insolvent—Bond given after personal discharge in respect of a scheduled debt—Private settlement with one creditor without knowledge of Official Assignee and other creditors—Implied agreement by creditor not to oppose discharge—Consideration—Public policy—Evidence—Untrue recital in bond—Contradiction allowed.

The defendant, an insolvent, who had obtained his personal but not his final discharge, without notice to the Official Assignee or his other creditors settled the claim

(1) I. L. R. 18 Bom. 614. (2) I. L. R. 8 Cal. 288. (3) I. L. R. 15 All. 56.

* Reported at I. L. R. 20 Bom. 636.

of one creditor, the plaintiff, by passing to him a bond. The bond, after reciting that all the creditors of the defendant (other than the plaintiff) had been settled with, provided that defendant should pay plaintiff Rs. 800, in cash (which was paid) and that defendant should forthwith apply to have satisfaction of the judgment against him in favour of the Official Assignee entered up, and that he should execute in favour of the plaintiff a conveyance of certain property, subject to a mortgage thereon, or if such property should be sold, an assignment of his right, title, and interest in the balance of the purchase-money, and that if, in the event of his failing to apply to the Court or to execute such conveyance or assignment he should pay plaintiff Rs. 1,600, the bond should be void : otherwise it should continue in full force and effect. In a suit by plaintiff on the bond,

Held, that evidence was admissible to contradict the recital in the bond, and that, it having been shown that all the creditors of the defendant (other than the plaintiff) had not been settled with, the bond was void as having been passed in fraud of such creditors.

If part of the consideration for the bond was an implied agreement by the plaintiff not to oppose the final discharge of the defendant, then such agreement was not in accordance with public policy or with the spirit of the Indian Insolvent Act (11 and 12 Vic. c. 21). Although a creditor is not bound to oppose the final discharge, if cannot be in accordance with public policy that, by a private agreement with the insolvent and in consideration of a money payment, he should bind himself not to oppose it.

CASE stated for the opinion of the High Court under section 69 of the Presidency Small Cause Courts Act (XV. of 1882) by C. W. Chitty, Chief Judge.

1. This was a suit brought by the plaintiff to recover from the defendant a sum of Rs. 1,600, alleged to be due to him under a bond passed to him by the defendant and dated the 7th June 1893.

2. The facts of the case, together with the reasons for my decision, are fully set out in my judgment, a copy whereof is hereto annexed, and to which for brevity's sake I crave leave to refer.

3. A copy of the bond is also annexed hereto.

4. The questions for their Lordships' considerations will be three in number :

(1) Whether a debt, which has been inserted in an insolvent's schedule, and in respect of which he has obtained his personal discharge, and which has moreover been included in the judgment entered up against him in favour of the Official Assignee, can form a good consideration for a new promise to pay the same debt?

(2) Whether evidence was admissible to contradict the recital contained in the bond, that all the creditors of the obligee (other than the plaintiff) had been settled with?

1896.

NAOROJI
NUSSERAWANJI
THUNTI
vs.
KAZI SIDICK
MIEZA KAZI
AHMED
MIRZA.

1896.

NAOROJI
NUSSEERWANJI
THUNTI
vs.
KAZI SIDICK
MIRZA KAZI
AHMED
MIRZA.

(3) Whether if such evidence be admissible, and it is shown that all the creditors (other than the plaintiff) have not been settled with, the bond is not void as being passed in fraud of such creditors?

For the reasons set out in my judgment, I dismissed the suit and certified Rs. 165. as the professional costs of the defendant. This amount, with Rs. 50 to meet the costs of reference, has been deposited by the plaintiff.

The bond was in the following terms :

"Know all men by these presents that I, Kazi Sidick Mirza Kazi Ahmed Mirza, of Bombay, Mahomedan inhabitant, am held and firmly bound to Naoroji Nusserwanji Thunti, also of Bombay, Parsi inhabitant, in the sum of Rs. 3,200 (three thousand and two hundred), to be paid to the said Naoroji Nusserwanji Thunti or to his executors, administrators, or assigns, for which payment to be well and truly made I bind myself, my heirs, executors, and administrators firmly by these presents. Whereas the above bounden Kazi Sidick Mirza Kazi Ahmed Mirza being unable to pay his debts filed a petition and schedule in the Court for the Relief of Insolvent Debtors holden at Bombay on the 7th day of June 1893, and by an order made by the said Court all the property and effects of the said Kazi Sidick Mirza Kazi Ahmed Mirza were vested in the Official Assignee, and whereas on the . . . day of 189 . . the said Kazi Sidick Mirza Kazi Ahmed Mirza got his personal discharge from the said Court, in respect of the debts mentioned in the schedule, and judgment was entered in favour of the Official Assignee for the total amount of the debts due by the said Kazi Sidick Mirza Kazi Ahmed Mirza in the said schedule, and whereas subsequently the said Kazi Sidick Mirza Kazi Ahmed Mirza settled with all his creditors except the said Naoroji Nusserwanji Thunti, and whereas the said Kazi Sidick Mirza Kazi Ahmed Mirza then proposed also to settle the claim of the said Naoroji Nusserwanji Thunti of Rs. 4,000, costs and interest, and the said Naoroji Nusserwanji Thunti has ultimately agreed to settle his said claim in the manner following :—That the said Kazi Sidick Mirza Kazi Ahmed Mirza should pay Rs. 800 (eight hundred) in cash, and apply immediately after the execution of these presents to the Insolvent Debtors' Court at his own expense to get satisfaction entered of the judgment passed as aforesaid against the said Kazi Sidick Mirza Kazi Ahmed Mirza in favour of the Official Assignee and upon such satisfaction being entered the said Kazi Sidick Mirza Kazi Ahmed Mirza should execute in favour of the said Naoroji Nusserwanji Thunti a conveyance at the cost of the said Naoroji Nusserwanji Thunti of the properties described in the schedule hereunder written subject to a certain indenture of mortgage dated the day of 189 . . made between the said Kazi Sidick Mirza Kazi Ahmed Mirza of the one part and one Mr. Pestonji Rustomji Kanga of the other part and to the payment of the principal amount and interest due at the foot of the said mortgage: Provided, however, that if Karamali Pirbhai and Meherali Khakhi to whom the said Kazi Sidick Mirza Kazi Ahmed Mirza has contracted to sell

the said properties should insist on carrying out the said contract, and they are entitled by law to do so, the said Kazi Sidick Mirza Kazi Ahmed Mirza shall, in lieu of the conveyance hereinbefore mentioned, execute an assignment to the said Naoroji Nusserwanji Thunti at the cost of Naoroji Nusserwanji Thunti of the right, title, and interest of the said Kazi Sidick Mirza Kazi Ahmed Mirza in the balance of the purchase-money remaining to be paid by the said Karamali Pirbhai and Meherali to the said Kazi Sidick Mirza Kazi Ahmed Mirza, and that in the event of the said Kazi Sidick Mirza Kazi Ahmed Mirza failing to execute the said conveyance or assignment as aforesaid, the said Kazi Sidick Mirza Kazi Ahmed Mirza should pay the said Naoroji Nusserwanji Thunti a further sum of Rs. 1,600 (sixteen hundred) in cash, and that he the said Kazi Sidick Mirza Kazi Ahmed Mirza should to secure payment of the same execute the above written bond subject to the conditions hereafter appearing. Now the conditions of the above written bond or obligation are such that if the said Kazi Sidick Mirza Kazi Ahmed Mirza shall forthwith apply at his own expense to the Insolvent Debtors' Court to enter and cause to be entered satisfaction of the judgment passed against the said Kazi Sidick Mirza Kazi Ahmed Mirza in favour of the Official Assignee as aforesaid, and upon satisfaction being entered if the said Kazi Sidick Mirza Kazi Ahmed Mirza shall execute in favour of the said Naoroji Nusserwanji Thunti a conveyance at the cost of the said Naoroji Nusserwanji Thunti of the properties described in the schedule hereunder written subject to a certain indenture of mortgage dated the . . . day of . . . 189 . made between the said Kazi Sidick Mirza Kazi Ahmed Mirza of the one part and the said Pestonji Rustomji Kanga of the other part and to the payment of the principal amount and interest thereby secured: Provided however that in the event of Karamali Pirbhai and Meherali Khakhi, to whom the said Kazi Sidick Mirza Kazi Ahmed Mirza has contracted to sell the said properties, insisting on carrying out the said contract and their being entitled by law to do so if the said Kazi Sidick Mirza Kazi Ahmed Mirza shall, in lieu of the said conveyance hereinbefore mentioned, execute an assignment in favour of the said Naoroji Nusserwanji Thunti of the right, title, and interest of the said Kazi Sidick Mirza Kazi Ahmed Mirza in the balance of the purchase-money remaining to be paid by the said Karamali Pirbhai and Meherali to the said Kazi Sidick Mirza Kazi Ahmed Mirza and in the event of the said Kazi Sidick Mirza Kazi Ahmed Mirza failing to apply to the Court and to execute the conveyance or assignment as aforesaid, if the said Kazi Sidick Mirza Kazi Ahmed Mirza shall pay the said Naoroji Nusserwanji Thunti Rs. 1,600 (sixteen hundred) in cash, then and in such event the above written bond or obligation shall be void: otherwise the same shall remain in full force and virtue. In witness whereof &c."

The following was the judgment of the Chief Judge :

This is a suit by the plaintiff to recover from the defendant a sum of Rs. 1,600 alleged to be due to the plaintiff on a bond executed by the defendant. The case first came on before me for hearing on the 28th August 1895, when the following defences were raised : (1) Deny consideration for the bond ; (2) Bond

1896.

NAOROJI
NUSERWANJI
THUNTI
vs.
KAZI SIDICK
MIRZA KAZI
AHMED
MIRZA.

1896.

NAOROJI
 NUSSERWANJI
 THUNTI
 &S.
 KAZI SIDICK
 MIRZA KAZI
 AHMED
 MIRZA.

void under section 257A of the Civil Procedure Code; (3) Deny breach of any condition of the bond; (4) Deny that plaintiff was ready and willing to perform his part of the contract under the bond; (5) Defendant still ready and willing to carry out his part of the contract. After hearing arguments on both sides as to the questions raised by the first two issues and reserving judgment, I found it would be necessary to go into evidence, and the matter was again called on for hearing before me on the 27th November and 4th December. The defendant's counsel abandoned the second issue, but raised two further issues, (6) Whether the bond is not void as being a fraud on the creditors of defendant, (7) Whether the conditions have been fulfilled on which plaintiff is entitled to claim Rs. 1,600. There is no great difficulty in arriving at the true state of the facts of the case. On 12th December 1890 the defendant filed his petition and schedule in the Insolvent Debtors' Court. In the schedule five creditors are mentioned: (1) The plaintiff in respect of a decree in High Court suit No. 387 of 1890 against defendant and his mother Jinabai for Rs. 4,734-4-10 and the balance of a Small Cause Court decree Rs. 183-11-0; (2) A Márwári for Rs. 1,000; (3) Pestonji Rustomji Kanga in respect of a mortgage dated 28th September 1888 on land of Bhiwandi for Rs. 7,000 and also a promissory note on personal security for Rs. 500; (4) Jinabai, defendant's mother, in respect of two promissory notes for Rs. 1,000 and Rs. 2,000 respectively (of which Rs. 1,000 were paid off); and (5) another Márwári for Rs. 200. The insolvency of defendant was proceeded with and his discharge was opposed by the plaintiff. He however obtained his personal discharge on the 11th April 1892, and on the same day judgment was entered up against him in the name of the Official Assignee for Rs. 15,623-6-10, the amount of the debts stated in the schedule. Before his insolvency the defendant had contracted to sell the Bhiwandi property to Pirbhai Khakibhai and others for Rs. 11,000, subject to the mortgage of Pestonji R. Kanga. It was referred to Mr. Bhaishanker Nanabhai, the mortgagee's solicitor, to take the account of what was due on the mortgage, and he ascertained the amount to be Rs. 11,037-3-6. Pirbhai Khakibhai and his brothers had agreed to be bound by the finding, and it was accordingly on the 6th February 1894 made an order of Court that they should pay the amount to the mortgagee and that he should re-convey the property to them. In the meanwhile in 1893 the plaintiff had taken from the defendant the bond in this case. That bond is dated 7th June 1893, and provides for the payment of Rs. 800 in cash by defendant, which was paid. The bond contains a recital that all the creditors of the defendant have been settled with, except the plaintiff, and it contains conditions to the effect that defendant shall forthwith apply to have satisfaction of the judgment in favour of the Official Assignee entered up, and that defendant should then execute to plaintiff a conveyance of the Bhiwandi property subject to the mortgage in favour of Pestonji R. Kanga, and the amount thereby secured, or in case Pirbhai Khakibhai and his brothers should insist on carrying out the sale, then that defendant should execute in favour of plaintiff an assignment of his (defendant's) right, title, and interest in the balance of the purchase-money, and in the event of defendant's failing to

apply to the Court to execute such conveyance or assignment, then that, if defendant should pay the plaintiff Rs. 1,600, the bond should be void, otherwise it should continue in full force and effect. On this state of things three questions arise for determination—(1) Was there any consideration for this bond, (2) Is the bond a fraud on the creditors, (3) Have the conditions been fulfilled to enable plaintiff to recover. The first question is one of considerable nicety and turns upon the interpretation to be put upon the Insolvent Debtors' Act. It was contended for the defendant by counsel that the matter was concluded by authority, and he quoted the case of *Peakman vs. Harrison*.⁽¹⁾ There can be no doubt that if the Indian Act was the same in its terms as the enactment which governed that case (7 Geo. IV. c. 57) there would be an end of the matter. There is however a very important difference. In that case it is not stated that the old debt cannot form a good consideration for the new promise, except as being a fraud on the Statute, which enacts it in so many words (section 61). Now in the Indian Act there is no such provision, and it is to be noticed that it is also omitted in the later English Acts, thereby showing an intention on the part of the Legislature to change the law in that respect. The existence of this section was the *ratio decidendi* in *Peakman vs. Harrison*,⁽¹⁾ and that does not govern this case. In other respects the Acts are similar, the warrant of attorney to confess judgment corresponding to the judgment in favour of the Official Assignee. I am inclined to think, therefore, that the old debt would form a good consideration for the new promise. It is somewhat analogous to the case of a debt barred by limitation, which is provided for in the Contract Act. I do not, however, consider it necessary to decide this point, as, in my opinion, it is quite clear that on the second question the suit must fail. As to the fact whether the creditors of the defendant except the plaintiff had been settled with at the date of the bond, the plaintiff's solicitor evidently felt considerable difficulty, as was evinced by his very strenuous opposition to such evidence being given. It was said that the defendant having recited in the bond that all the creditors were settled with, was estopped from now averring the contrary. There may be estoppel by recital, as the cases cited by Mr. Moos showed, but in this case I was of opinion there could be no such estoppel. It did not appear that plaintiff had acted on any such belief, but, even if he had, the question here is not so much between plaintiff and defendant as of public policy. Is this bond good or bad? Is it a fraud on creditors? To give plaintiff a decree without considering whether the statements in the bond were true or false might materially prejudice the other creditors, if any, of the defendant. The defendant also stated, and I am inclined to believe him, that he did not know that there was any such recital in the bond. Mr. Framji's evidence was evidently unsatisfactory, and his statement on this point not borne out by any documentary proof. The bond was evidently hastily completed and executed, as is shown by the date of the bond being put in the wrong place and all other blanks being left unfilled. I think that it is more probable that no particular mention of settlement with

1896.

NAOROJI
NUSSEERWANJI
THUNTI
vs.
KAZI SIDICK
MIRZA KAZI
AHMED
MIRZA.

(1) L. R. 14 Eq. 484.

1896.

NAOROJI
NUSSEERWANJI
THUNTI
ES.
KAZI SIDICK
MIRZA KAZI
AHMED
MIRZA.

creditors was made, but that the recital was put into the deed by those who prepared it, as they knew that, unless that was the fact, the bond would be worthless. As to the evidence on this point I have no doubt whatever that all the creditors (other than plaintiff) were not settled with. Admittedly the claim of the two Mārwaris had been settled, but Pestonji R. Kanga's mortgage was still outstanding. Indeed that appears from the body of the bond itself. It could not be known if the purchase-money of the property agreed to be paid by Pirbhai Khakibhai would exceed the amount of the mortgage-debt and interest. As a matter of fact, we now know it fell short of it by a few rupees. The evidence of Mr. Bhaishankar as to the promissory note for Rs. 500 in favour of Pestonji R. Kanga is conclusive. That note, he says, remains in his office and is now with him, and as he manages all Pestonji's affairs (Pestonji being over 80 and unable to attend to his own business), it would be highly improbable that it could have been discharged by Pestonji without his knowledge. The note too in that case would almost certainly have been returned to defendant. Then there is the debt of Jinabai, defendant's mother. The evidence stands uncontradicted that her debt of Rs. 2,000 is still unpaid. There is nothing to show that it was a fictitious claim. It is a scheduled debt and is included in the judgment in favour of the Official Assignee, so it must now be held to be a good debt. This being so, I have no difficulty in holding that the bond would have the effect of giving the plaintiff an undue preference over other creditors whose claims are unsatisfied, and I think the law is clear that such a security is void. If the defendant has any after-acquired property it should come to the Official Assignee to be applied rateably for the benefit of all the remaining creditors. It cannot be right that the plaintiff should appropriate it all for his own particular debt. Mr. Moos said he knew of no Act which laid down such a proposition, but I think no distinct legislative enactment is required. If it were allowed it would defeat the provisions of the Insolvency Act generally. For these reasons I think the plaintiff's suit must fail. It is therefore unnecessary to go into the third question as to the conditions of the bond. As, however, the case is to go to the High Court, I may mention that, as a matter of fact, the defendant has not applied to have satisfaction of the judgment entered up. The negotiations for the sale of the Bhiwandi property are still proceeding, and further time has been given to the purchasers to pay up the purchase-money. It is therefore impossible as yet to say whether the defendant would have to execute the conveyance or the assignment. If it were the latter it would appear that there would be no balance of purchase-money to assign. The suit must be dismissed. The defendant's professional costs Rs. 165 certified. Judgment contingent on the opinion of the High Court on a case to be stated at plaintiff's request.

Inverarity for plaintiff.

Scott for defendant.

JUDGMENT OF THE HIGH COURT (Parsons, J., and Strachey, J.)
was delivered by

STRACHEY, J.—This is a case stated for the opinion of the High Court by the Chief Judge of the Court of Small Cause at Bombay. The facts are fully stated in the reference. The suit was for the recovery of Rs. 1,600 under a bond executed by the defendant in favour of the plaintiff on the 7th June 1893. At the date of the execution of the bond the defendant was an insolvent who had obtained his personal discharge under section 47, but not his final discharge under section 59, or section 60, of the Indian Insolvent Act, 11 and 12 Vic. c. 21, and against whom judgment had been entered up in the name of the Official Assignee under section 86. The plaintiff was one of the scheduled creditors, his debt being for more than Rs. 4,000, and he had opposed the insolvent's discharge. The bond recites the insolvency proceedings, and stated that subsequently to the entering up of judgment the insolvent had settled with all his creditors except the plaintiff. That statement is found by the Chief Judge to be untrue. The bond then sets forth that the plaintiff had agreed to a proposal made by the insolvent to settle the claim for Rs. 4,000 odd in the manner following, namely, that the insolvent should pay Rs. 800 in cash; that he should immediately apply to the Insolvent Court to have satisfaction entered up on the judgment; that upon this being done he should execute in favour of the plaintiff a conveyance of certain property subject to a mortgage; that if, owing to certain persons, who had previously contracted to purchase the property, insisting on carrying out their contract, this could not be done, he should execute an assignment to the plaintiff of his right, title, and interest in the balance of the purchase-money, and that, in the event of his failing to apply to the Court, and to execute the conveyance or assignment, he should pay to the plaintiff a further sum of Rs. 1,600 in cash. The Chief Judge dismissed the suit subject to the opinion of this Court upon the three questions which he has stated. The first question is, "Whether a debt which has been inserted in an insolvent's schedule, and in respect of which he has obtained his personal discharge, and which has moreover been included in the judgment entered up against him in favour of the Official Assignee, can form a good consideration for a new promise to pay the same debt." If it were necessary to decide that question

1896.

NAOROJI
NUSSEERWANJI
THUNTI
ES.
KAZI SIDICK
MIRZA KAZE
AHMED
MIRZA.

1896.

NAOROJI
NUSSEERWANJI
THUNTI
vs.
KAZI SIDICK
MIRZA KAZI
AHMED
MIRZA.

I should have great difficulty in answering it in the affirmative. In England it is settled that a promise to pay a debt barred by bankruptcy is a mere *nudum pactum*, as there is no consideration for it—*Jones vs. Phelps*,⁽¹⁾ *Heather vs. Webb*,⁽²⁾ though it is binding if there is new consideration—*Jakeman vs. Cook*.⁽³⁾ In India the same principle would apply to a promise by an insolvent without new consideration to pay a debt from which he had obtained his final discharge, the Contract Act containing no exception in favour of such promises, such as section 25 (3) in favour of promises to pay debts barred by limitation. How far the principle would apply without new consideration to pay a debt in respect of which the insolvent has obtained only his personal and not his final discharge, which is included in the judgment entered up against him in favour of the Official Assignee, and as to which the creditor's remedy, though not strictly speaking barred, is transferred to the Official Assignee, who alone can recover the debt in the manner and subject to the conditions provided by the Statute, is a question which we need not consider, because it has not really been argued before us. What the learned counsel for the plaintiff contended was that there was ample new consideration for the bond in suit. He argued that in the first place the plaintiff gave up a considerable part of the debt and impliedly assented to satisfaction being entered up on the judgment so far as concerned him, and that, secondly, he impliedly gave up his right to oppose the insolvent's final discharge. Whether this argument is sound chiefly depends upon the construction to be placed upon the bond. Having regard to the document as a whole, and in particular to the recital that the insolvent had proposed to "settle the claim" of the plaintiff in the manner following, I think that the bond must be regarded as a compromise by which the plaintiff, in satisfaction of his claim for Rs. 4000, agreed to accept from the defendant a present cash payment of Rs. 800, and either the execution of a conveyance or assignment, or the payment of a further Rs. 1,600 in cash. I think that he impliedly gave up, in consideration of the bond, his right to share in any future rateable distribution under section 86 of the Act. If, after the execution of the bond, any sum were obtained by the Official Assignee for the

(1) 20 W. R. 92.

(2) L. R. 2 C. P. D. 1.

(3) L. R. 4 Ex. D. 26.

purpose of such distribution, it would, under section 86, be distributed according to the mode directed in the case of a dividend, and under section 40 the plaintiff would have to prove his claim to share in the distribution in the same manner, and subject to the like deductions, conditions, and provisions as in the English Bankruptcy Acts for the time being in force. Under the rules contained in the second schedule of the Bankruptcy Act, 1883, he would have to verify it by an affidavit showing its particulars, and under Form 72 of the forms in the Appendix of the Bankruptcy Rules, 1886, made under section 127 of the Act, the affidavit must state that the debt still remains due and unsatisfied, and that neither the claimant nor any persons by his order has received any manner of satisfaction or security except as specified. If Rs. 800 or any other sum had been received on account of the scheduled debt, that would have to be stated in the affidavit, and the Official Assignee in making a rateable distribution under section 86, would take such payment into account. If upon any such claim being made, it were brought to the knowledge of the Official Assignee that the claim had been fully satisfied by payment or the acceptance of a bond or otherwise he would disallow it. I understand that this represents the practice of the Official Assignee of the Insolvent Court at Bombay. Whether the Official Assignee in addition to disallowing the claim would or could take steps to recover, for the benefit of the creditors generally, so much of the money paid to the claimant as exceeded the sum to which he would be entitled on a rateable distribution is another question. At all events the plaintiff could not in disregard of a settlement of this kind still claim for the whole debt under section 86, and that being so, I think that he does give up a part of his claim. It was contended for the defendant that the plaintiff would not be bound by any undertaking to give up part of the claim, and in support of this contention the case of *Foakes vs. Beer*⁽¹⁾ was cited. That case, however, which was decided by the House of Lords with great reluctance, Lord Blackburn almost dissenting, does not represent the law of British India; see Dr. Whitley Stokes' Notes to section 63 of the Contract Act; Pollock on Contracts (6th Ed.). p. 177, note (d); and *Manohur Koyal vs. Thakurdas Nasker*.⁽²⁾ If this view is correct, if the plaintiff by accepting the bond impliedly gives up his right as a scheduled

1896.

NAOROJI
NUSSEERWANJI
THUNTI
vs.
KAZI SIDICK
MIRZA KAZI
AHMED
MIRZA.

(1) L. R. 9 A. C. 605.

(2) I. L. R. 15 Cal. 319.

1896.

NAOROJI
NUSSEERWANJI
THUNTI
vs.
KAZI SIDICK
MIRZA KAZI
AHMED
MIRZA.

creditor under section 85, I think it follows, as contended by Mr. Inverarity, that he also impliedly gives up the right, which is accessory to it, of opposing the final discharge of the insolvent. Whether a consideration of that kind is lawful, whether an agreement by a scheduled creditor not to oppose the discharge in consideration of a promise by the insolvent to pay part of the debt is in accordance with public policy, is a point which I shall discuss in connection with the third question referred to us by the Chief Judge. So far as the first question is concerned, I think, for the reasons which I have given, that there is consideration for the bond in suit.

The second question is, "Whether evidence was admissible to contradict the recital contained in the bond that all the creditors of the obligor (other than the plaintiff) had been settled with." Upon this question I agree with the learned Chief Judge. The fact that the other creditors had not been settled with, is material upon the question, whether the object of the bond was to give the plaintiff an unfair advantage over the other creditors, and whether the bond was for that reason void as a fraud upon them and opposed to public policy. Evidence of such a fact, in contradiction of the terms of the bond, was admissible under the first proviso to section 92 of the Evidence Act, and in accordance with the authorities cited in the notes to *Collins vs. Blantern* (1. Smith's Leading Cases (9th Ed.), 398) and paragraph 93 of Taylor on Evidence (9th Ed.). In such a case there is no estoppel. Apart from the principle that a party is not estopped from proving that the instrument was executed for an unlawful purpose, there is nothing to bring the facts of the present case within section 115 of the Evidence Act. I am therefore of opinion that the second question must be answered in the affirmative.

The third question is, "Whether if such evidence be admissible, and it is shown that all the creditors (other than the plaintiff) have not been settled with, the bond is not void as being passed in fraud of creditors." To decide this it is necessary to look at the provisions of the Insolvent Act, and to consider their policy. By the vesting order under section 7 the insolvent's after-acquired as well as his existing property vests in the Official Assignee, who has full powers for its recovery, and who holds it as a trustee for all the creditors admitted on the schedule: *In re Dewcurn Jivraj*.⁽¹⁾ By sec-

(1) I. L. R. 12 Bom. 342.

tions 59 and 60 a final order of discharge can only be made after notice to the creditors, any of whom is at liberty to oppose it, and its effect is to discharge the insolvent personally and also his after-acquired property, in the case of a trader, from all demands with certain specified exceptions, and in the case of a non-trader from the demands of all the creditors named in the order *nisi*. By section 86, the Court may, before making an order of final discharge, direct judgment to be entered up against the insolvent in the High Court in the name of the Official Assignee for the amount of the debts stated in the schedule and established, the judgment may under certain conditions be executed against any after-acquired property of the insolvent, and the proceeds of the execution must be distributed rateably among the creditors as in the case of a dividend. When the debts have been satisfied, the Court may under section 87 direct satisfaction to be entered up on the judgment, and then if any property of the insolvent remains with the Official Assignee, the Court may order that it shall be vested in and delivered up to the insolvent. It is only by such an order or by dismissal of the petition or the revocation of the adjudication that the original vesting order ceases to have effect. From these and other provisions it is obvious that the policy of the Act is to make the relief of the insolvent conditional upon the whole of his property, after-acquired as well as existing, being given up to the Official Assignee and made available for rateable distribution among all creditors, whose claims are established without preference of any of them, and upon all being free to oppose the discharge. A bargain made by the insolvent before discharge, behind the backs of the Official Assignee and the creditors generally, which might have the effect of giving a particular creditor more than he would be entitled to on a rateable distribution, and by which the creditor in return agrees not to oppose the discharge, is, in my opinion, inconsistent with that policy. It appears to me that this is a substantially correct description of the bond in suit. It is an agreement by the insolvent in certain events to transfer certain property or to pay Rs. 1,600 to the plaintiff in settlement of his claim. If the other creditors had been paid, or if the agreement were to pay the plaintiff in the event of their being paid in full, or of satisfaction being entered up on the judgment, it might not be open to objection. But in the first

1896.

NAOROJI
NUSSEERWANJI
THUNTI
vs.
KAZI SIDICK
MIRZA KAZI
AHMED
MIRZA.

1896.

NAOROJI
 NUSSEER WANJI
 THUNTI
 vs.
 KAZI SIDICK
 MIRZA KAZI
 AHMED
 MIRZA.

place the recital that the other creditors have been settled with is found to be untrue, and in the second place it is not in the event of satisfaction being entered up, but in the event of the insolvent failing to apply for its being entered up, and to do certain other things, that the Rs. 1,600 is to be paid. - It is not alleged that satisfaction has been entered up; the Chief Judge finds that the insolvent has not applied to have it entered up, and so long as any creditor remained unsatisfied, no application for that purpose could be entertained. The Rs. 800 which under the bond has already been paid to the plaintiff, and the Rs. 1,600 which the insolvent binds himself to pay and to recover which the suit is brought, are not the property of the insolvent, but that of the Official Assignee in trust for all the creditors, and every creditor, and not only the plaintiff, is entitled to share in it. The bargain is carried out behind the backs of the Official Assignee and the other creditors, who are not shown to have had notice of it or to have assented to it. To hold that such an agreement should be given effect as between the insolvent and the plaintiff, so long as the Official Assignee does not interfere, but that the Official Assignee, if he thinks fit, can step in and protect the other creditors by claiming the money, would be to put a premium on secret dealings between the insolvents and particular creditors whom they may be induced to favour. Such a result is inconsistent with the provisions of the Statute securing to the creditors a rateable distribution of all the insolvent's property, and implying that the insolvent is to deal with them openly and impartially, and to assist in the appropriation of the property for their benefit. In cases where the Official Assignee became aware of a disposition of moveable property by the insolvent in favour of a particular creditor he might be hindered or delayed in recovering it from the creditor or from any transferee from the creditor. If, as was contended, the doctrine of *Cohen vs. Mitchell* ⁽¹⁾ applied to such a case, the further consequence would follow that when once the money had been paid over or other property had passed from the insolvent under the agreement, whether by voluntary act or in execution of decree, it would be too late for the Official Assignee to intervene, and, the creditor acquiring a complete title, the property would be irrevocably lost to the other creditors. In that view the Rs. 800 already paid to the

(1) L. R. 25 Q. B. D. 262.

plaintiff could not be recovered. Again, if the insolvent could make a bargain of this kind with one of his creditors he could do so with others. If he had ten creditors he might secretly agree with five to pay them the greater part of their claims, leaving the others wholly unpaid, and thus effect a distribution of assets wholly inconsistent with that contemplated by the Statute. It is of course conceivable that a compromise, by which a particular creditor gave up his right to future dividends in consideration of a present part payment, might ultimately turn out advantageous to the other creditors. Whether it would be so or not it would be impossible at the time of the compromise to determine. It would depend upon whether, subsequently to the payment, the insolvent acquired property of such value as to realize for each of the other creditors a larger dividend than he would have been entitled to if no compromises had been made, and if the creditor settled with had not been excluded from the subsequent distribution. If, subsequently to the payment, the insolvent acquired no property at all, each of the other creditors would necessarily lose the dividend to which he was entitled out of the money paid. Again, accepting the contention that part of the consideration for the bond is an implied agreement by the plaintiff not to oppose the final discharge of the insolvent, is such an agreement in accordance with public policy and with the spirit of the Statute? I am of opinion that it is not. The right to oppose the final discharge is given to a creditor not only for his own benefit but for the benefit of all the creditors and of the whole community, which is interested in the bringing to light of anything in the conduct of the insolvent which disentitles him to re-commence business free from past liabilities. In considering whether the discharge should be granted, the Court has to consider the insolvent's entire conduct and not merely his conduct with reference to the opposing creditor. That principle was laid down by Mr. Justice Gibbs *In re Pestonji Shapurji Kaka*.⁽¹⁾ If it is correct, then although a creditor is not bound to oppose the final discharge it cannot be in accordance with public policy that, by a private agreement with insolvent and in consideration of a money payment, he should bind himself not to oppose it. In England there are many cases in which such agreements have been held to be void as opposed to the policy

1896.

NAOROJI
 NUSSERWANJI
 THUNTI
 vs.
 KAZI SIDICK
 MIRZA KAZI
 AHMED
 MIRZA.

(1) Bom. H. C. R. 39.

1896.

NAOROJI
 NUSSEERWANJI
 THUNTI
 VS.
 KAZI SIDICK
 MIRZA KAZI
 AHMED
 MIRZA.

of the Insolvency and Bankruptcy Acts, and as in fraud of creditors. In *Jackson vs. Davison*,⁽¹⁾ a case of 1821—decided under 1 Geo. IV. c. 119—an insolvent in order to induce a creditor to withdraw opposition to his discharge agreed to create a warrant of attorney for the debt, and in pursuance of the agreement the insolvent was discharged, the warrant of attorney executed, and judgment entered up thereon by the creditor. A rule *nisi* having been obtained to set aside the warrant of attorney and the judgment, the Court set both aside on the ground that the agreement on which they were founded was contrary to the policy of the Insolvency Act, inasmuch as it enabled the creditor to take to himself a large portion of the future effects, which the Legislature intended to be distributed among all the creditors, and defeated the effect of the judgment entered up by order of the Insolvent Court. In *Murray vs. Reeves*⁽²⁾ the debt due to the opposing creditor was a judgment debt of £2,686. In consideration of the creditor withdrawing his opposition to the discharge, the attorney of the insolvent undertook that he should be the sole assignee of the estate and should receive £100 out of it within three weeks from his appointment. It was held that this agreement was contrary to the policy of the Insolvent Act and therefore void. That decision was followed in *Hall vs. Dyson*,⁽³⁾ a case decided under 1 and 2 Vic. c. 110. There the opposing creditor's claim was for £400. It was held that an agreement by the insolvent to pay him £50 in consideration of his withdrawing his opposition was void, being contrary to the policy of the Insolvent Debtors' Act, and a fraud upon the other creditors. In his judgment Lord Campbell, C.J., said: "There is no doubt that the plaintiff might have withdrawn his opposition if he chose, but he had no right to do so in consideration of a money payment." In *Hills vs. Mitson*,⁽⁴⁾ decided under the same Statute, the Court, consisting of Pollock, C.B., and Parke, Alderson, and Martin, BB., applied the principle of *Hall vs. Dyson* to an action upon a promissory note executed in favour of a particular creditor, not by the insolvent but by a third person, in consideration of the creditor ceasing to oppose and undertaking not in future to oppose the insolvent's discharge. It was attempted, but without success, to distinguish *Jackson vs. Davison* and similar

(1) 4 B. & Ald. 691.

(2) 8 B. & C. 421.

(3) 17 Q. B. 785.

(4) 8 Exch. 751.

cases on the ground that in them the agreement, being made with the insolvent himself, had the effect of giving to a particular creditor property, which ought to be distributed among all the other creditors. On the other hand, it was pointed out that "it is not the opposing creditor alone who is interested in the opposition, but that it enures to the benefit of the other creditors," and that if such an agreement were allowed, the insolvent might arrange with a particular creditor whose opposition he feared by means of a third person, at the same time undertaking to pay the latter after his discharge. In *Humphreys vs. Welling*,⁽¹⁾ decided in 1862 under 7 and 8 Vic. c. 96, an agreement was entered into between an opposing creditor and the insolvent that the latter should give the former a promissory note as a security for the debt, and that the creditor in consideration thereof should not oppose the making of a final order for protection. This arrangement was sanctioned by the Commissioner of the Court, who adjourned the final hearing to allow of its being effected. The promissory note was accordingly given, the opposition withdrawn, and the final order for protection made. It was held that the Court had no authority to sanction such an arrangement, that it was illegal notwithstanding such sanction, and that no action could be maintained upon the note. That case is important, not only because there the agreement had actually been sanctioned by the Commissioner of the Insolvent Court, but because it was argued that from the absence in 7 and 8 Vic. c. 96 of any provision such as section 61 of 7 Geo. IV. c. 57, or section 91 of 1 and 2 Vic. c. 110 preventing a creditor from suing upon any new contract or security for payment of a debt from which the insolvent had obtained his discharge, it should be inferred that the Legislature did not intend that such actions should be prohibited, and the Court nevertheless decided against the agreement upon general grounds of public policy. It follows that no inference in favour of such an agreement can be drawn from the absence of any similar provision in the Indian Insolvent Act, and that *Hall vs. Dyson* and other cases decided under 1 and 2 Vic. c. 110 cannot be distinguished on that ground, but are based, as indeed the reports show, upon the general policy of the Statute. If that view of the decisions is correct, they

1896.

NAOROJI
 NUSSEERWANJI
 THUNTI
 ES.
 KAZI SIDICK
 MIRZA KAZI
 AHMED
 MIRZA.

(1) 1 H. & C. 7.

1896.

NAOROJI
NUSSEERWANJI
THUNTI
vs.
KAZI SIDICK
MIRZA KAZI
AHMED
MIRZA.

have an obvious application to cases under the Indian Insolvent Act, which, as pointed out by Mr. Justice West *In the matter of Candas Narondas*,⁽¹⁾ was largely copied from the English law then in force, and 1 and 2 Vic. c. 110 in particular. The case of *Peakman vs. Harrison*,⁽²⁾ cited by the learned Chief Judge in his reference and decided in 1872, was in some respects different from those which I have mentioned. There the insolvent had obtained his discharge and given a warrant of attorney as required by the Statutes. He gave a scheduled creditor whose claim was for £500 a bill of sale on his effects to cover the prior debt and further advances. The creditor having seized under the bill of sale, and sold the effects, the debtor was adjudicated a bankrupt under the Bankruptcy Acts, and the creditors' assignee filed a bill praying that the revival of the debt £500 might be declared illegal, that accounts might be taken of the proceeds of the sale and of the sum justly due to the defendant, and that the defendant might be ordered to pay to the plaintiff what on taking such accounts might be found due. The Court held that the old debt could not be revived. The judgment certainly appears to have been based in part on the view that the bill of sale, so far as it related to the old debt, was the evasion of section 91 of 1 and 2 Vic. c. 110 (which re-enacted the provisions of section 61 of 7 Geo. IV. c. 57), but it also proceeded upon the broader ground of public policy taken in the other cases to which I have referred. Thus, the Vice-Chancellor said: "If an insolvent were at liberty to pledge after-acquired property, the consequence would be that it would give undue preference to one creditor over another, and the law is clear that in such a case the security is void. The distinction between bankruptcy and insolvency is clear. The insolvent only gets a discharge for his person; his after-acquired property remains liable, after satisfying the demands of subsequent creditors, to be seized under the insolvency. If, therefore, a creditor under the insolvency were to be allowed to take after-acquired property to secure a scheduled debt, he would defeat the object of the insolvency statutes by taking to himself alone what those statutes say shall be applied for the benefit of all. This is a fraud upon the Act of Parliament."

(1) I. L. R. 11 Bom. 138.

(2) L. R. 14 Eq. 484.

In *McKewan vs. Sanderson*,⁽¹⁾ Malins, V.C., cited *Hall vs. Dyson* as applying the principle that "whenever there are proceedings in bankruptcy or insolvency, or any arrangement between a debtor and his creditors generally, and one of the creditors stipulates either for the payment of a greater dividend to him than is paid to the other creditors, or for any collateral advantage whatever, even such as giving the right to purchase a horse, or any advantage whatever not common to the creditors, any payment made will be ordered to be repaid, any security given will be ordered to be given up, and this Court will treat the whole thing as fraudulent against the other creditors, and anything done in favour of the creditor who obtains this advantage will be set aside by this Court." The case of *Kearley vs. Thomson*⁽²⁾ was decided by the Court of Appeal in 1890, when the Bankruptcy Act of 1883 was in force. Neither that Act nor the Act of 1869 contains any provision similar to section 91 of 1 and 2 Vic. c. 110 or to section 167 of the Act of 1861 (re-enacting the substance of section 202 of the Bankruptcy Law Consolidation Act, 1849, and repealed by the Bankruptcy Repeal Act, 1869,) which made void all contracts or securities made or given as a consideration, or with intent to persuade a creditor to forbear opposing the allowance of a certificate. The Court of Appeal held on the authority of *Hall vs. Dyson* that an agreement, the consideration of which was an undertaking by a creditor not to appear at the public examination of the bankrupt, and not to oppose the order of discharge, was illegal, as obviously tending to prevent the course of justice. "Although," said Lord Justice Fry, "the defendants were under no obligation to appear, they certainly were under an obligation not to contract themselves out of the opportunity of appearing." In *In re Barkam*,⁽³⁾ a case of 1893, Mr. Justice Vaughan Williams held that a payment by a bankrupt to one of his creditors, made before the receiving order but after the petition and consequently after the time to which the trustee's title related back, with the view of giving that creditor a preference over the others, though not within the section relating to fraudulent preference, was a disposal of moneys which *prima*

1896.

NAOROJI
 NUSSEERWANJI
 THUNTI
 vs.
 KAZI SIDICK
 MIRZA KAZI
 AHMED
 MIRZA.

(1) L. R. 15 Eq. 229; 20 Eq. 65.

(2) L. R. 24 Q. B. D. 742.

(3) 69 L. T. 356.

1896.

NAOROJI
NUSSEERWANJI
THUNTI
VS.
KAZI SIDICK
MIRZA KAZI
AHMED
MIRZA.

facie belonged to the trustee, and should be set aside as contrary to the policy of the bankruptcy laws. It was however contended that the doctrine laid down by the Court of Appeal in *Cohen vs. Mitchell*⁽¹⁾ was applicable to the case, that according to that doctrine the after-acquired property of an insolvent who has not obtained his final discharge does not vest in the Official Assignee until the latter intervenes, and that, consequently, an agreement such as the bond in suit is valid and should be enforced subject to his right to intervene and claim the money. When that decision is read with the latter cases which explain and limit the general language which it uses, it will not be found to justify that conclusion. It was pointed out in *In re Rogers ex-parte Woodthorpe*,⁽²⁾ *In re New Land Development Association and Gray*,⁽³⁾ *In re Clark ex-parte Beardmoore*,⁽⁴⁾ *In re Rogers ex-parte Collins*,⁽⁵⁾ that the rule in *Cohen vs. Mitchell* was only applied for the purpose of protecting persons who had been trading with an undischarged bankrupt, and dealing with him *bond fide* for value without interference by the trustee, who had given him credit and been paid with money acquired by carrying on such business, and who on that ground were held to have good title, as against the trustee. Again, in *Kerakoose vs. Brooks*⁽⁶⁾ the Privy Council held that the only qualification of the Official Assignee's title to after-acquired property (apart from a qualification not material to the present case) was "that with the assent of the assignee of the estate under the Insolvent Act, in the first instance the property which is acquired in the subsequent trade will be subject in equity to the charge of the creditors in that trade, in priority to claim of the assignee under the first insolvency." There is nothing in *Cohen vs. Mitchell* which applies to an agreement by which a scheduled creditor accepts a present cash payment and a promise of a further payment in settlement of the debt from an undischarged insolvent not shown to have carried on any trade or business, and without the assent or knowledge of the Official Assignee. For these reasons I think that section 23 of the Contract Act applies to the case, and that the third question must be answered

(1) L. R. 25 Q. B. D. 262.

(3) (1892) 2 Ch. at p. 147.

(5) (1894) 1 Q. B. 425.

(2) 8 Morrell. 236.

(4) (1894) 2 Q. B. 393.

(6) 8 Moo. I. A. 339.

in the affirmative. Costs will be costs in the case. Mr. Justice Parsons authorizes me to say that he concurs in this judgment.

1896.

DHURAMDA'S ASANAND, PLAINTIFF, versus KANJI LILADHAR,
DEFENDANT.

1896.
April 17.

Valued policy—Stress of weather—Deviation—Delay at port of distress—Jettison of cargo—Damages—Jurisdiction of the Court—Act XV. of 1882, section 19 (l)—Liability of insurer.

The plaintiff shipped a cargo of tiles from Cana Mangalore to Bombay and had the same insured under a valued policy. Through stress of weather the vessel put in at Goa as a port of distress, and was there detained for about four months owing to the monsoon. On its voyage from Goa to Bombay the vessel again encountered a storm and jettisoned a portion of the cargo.

In a suit for damages to recover the value of the tiles jettisoned and the expenses for shipping and unshipping cargo,

Held, that in terms of section 19 (l) of Act XV. of 1882, the suit was not one for "general average loss or on a policy of insurance on a sea-going vessel," and the Court had jurisdiction to try it. *Held*, also, that in the circumstances of the case there was no *deviation*, so as to relieve the underwriter from his liability under the policy.

CASE stated for the opinion of the High Court by Rastamji Merwanji Patell, Second Judge, under section 69 of the Presidency Small Courts Act (XV. of 1882).

1. In this suit the plaintiff claimed Rs. 694-3-1 under a policy of insurance dated the 30th of April 1894. The plaintiff is the insured and the defendant the insurer under an English policy. The cargo insured was of Mangalore tiles on board the *Kotia Pankhera*, which was then lying at Cana Mangalore prior to an intended voyage from that place to Bombay.

2. The claim specifically was for Rs. 511-11-4, value of tiles jettisoned, and Rs. 182-7-9. expenses incurred in unshipping, warehousing, and reloading the tiles at Goa, where the vessel was obliged to put in through stress of weather.

3. A preliminary objection to the suit was raised on the ground of want of jurisdiction under clause (l) of section 19 of the Presidency Small Cause Courts Act. The policy, which was in English, distinctly stipulated that the insurance was "declared to be on goods valued as per margin" at Rs. 1,220; and I was of opinion that in

1896.

DHURAMDÁS
ASAÑAND
vs.
KANJI
LILADHAR.

terms of the said clause this was not a suit for general average loss nor one on a policy of insurance on sea-going vessels; and on the authority of the rule in *Dickenson vs. Jardine*⁽¹⁾ and Arnould on Insurance, 6th Ed., p. 915, I held that the Court had jurisdiction. The defendant then raised seven issues. I disallowed the item of expenses and found all the remaining issues in favour of the plaintiff.

4. On the question of fact I found (1) that the vessel started from Mangalore on its voyage to Bombay on or about the 7th of May 1894, but it encountered heavy adverse and tempestuous winds for about twelve days, and through stress of weather was obliged to put in at Goa as a port of distress. (2) That it remained at anchor at Goa for about ten days trying to steer out for Bombay, but owing to continued rough weather and the close of the fair season it was impossible for it to sail. (3) That the tiles were therefore unshipped and warehoused at Goa till the end of October, when the kotia was reloaded and started again on its voyage to Bombay on or about the 28th October 1894. (4) That the next day it again encountered tempestuous weather and the "tindal" was obliged to jettison a portion of the cargo for the safety of the vessel and the crew on board. That the vessel arrived in Bombay about the 4th or 5th of November following, when it was ascertained that 7,885 tiles and 193 ridge-tiles, or about half the cargo, had been jettisoned. I was of opinion that the jettison was justifiable.

5. The 6th issue is of importance with reference to the question asked to be submitted for the opinion of their Lordships. The issue as raised was "Whether there was any deviation." The cross-examination of the "tindal" (the chief witness for the plaintiff) was directed to elucidate one point only, whether it was necessary for the vessel to put in at Goa for refuge through stress of weather on the first voyage from Mangalore to Bombay in May 1894. After the plaintiff's case closed, defendant's counsel however developed this point into three heads during his argument; (1) the delay caused by the vessel in starting from Mangalore after the date of the policy, (2) abandoning the direct route from Mangalore to Bombay and going to Goa as to an intermediate port, (3) staying at Goa from the end of May to the 28th of October following, and not sailing out again

(1) L. R. 3 C. P. 639.

for Bombay either in the end of May or at the latest immediately after Cocanut Day (26th August 1894). I held that the delay of seven or eight days under the first head was not unreasonable. Nor was it attempted in the evidence to show that by a week's delay the risk materially varied. On the second point I held that the direct route was abandoned through stress of weather; that there was no voluntary or inexcusable departure from the course of the voyage, and that it was no deviation. On the third point the defendant's counsel admitted that if the vessel could not leave Goa after the fair season was over and the monsoon burst, she might not be able to sail till the 26th of August following, *i. e.* Cocanut Day, but he contended that any delay subsequent to the 26th August and up to the 28th October (Diváli Day) must be considered unreasonable and to amount to "deviation." I was of opinion that under the circumstances there was no doubt that the vessel was reasonably detained at Goa during the monsoon and up to Cocanut Day. I was also of opinion that the defendant having entirely omitted to raise this point specifically till after the plaintiff's case closed, and not having suggested it even in cross-examination, the defendant was precluded from raising the point afterwards, or, that if he was not so precluded, that still he failed to prove by evidence that any native craft did leave Goa for Bombay between the 26th August and 28th October 1894. If any such evidence had been given the plaintiff might have been allowed to rebut that. In the absence of any such evidence of native vessels having sailed from Goa to Bombay between the 26th of August to 28th October, I was of opinion that it was a fair inference to draw that the *Kotia Pankhera* could not leave Goa till after the monsoon was over, *i. e.* in the end of October, and that the delay under this head was not unreasonable, and did not amount to a deviation so as to discharge the policy. I relied on Arnould, 6th Ed., p. 1140, that deviation, properly so called, unreasonable delay or other acts that vary the risk must be specially pleaded.

6. On the evidence given by the plaintiff, as the policy was a valued policy for Rs. 1,220, and as almost half the cargo of tiles was jettisoned, I found that the amount of Rs. 511-11-4 claimed was fair and reasonable, and I passed a verdict for the same with professional costs Rs. 68, contingent on the opinion of the High Court at the request of defendant's counsel.

1896.

DHURAMDÁS
ABANAND
vs.
KANJI
LILADHAR.

1896.

DHURAMDÁS
ASANAND
vs.
KANJI
LILADHAR.

7. I now respectfully beg to submit the following two questions raised by the defendant's counsel at the close of the case for the opinion of their Lordships :

(1) Whether the Court had jurisdiction to entertain the suit notwithstanding the restriction in clause (l) of section 19 of the Act ?

(2) Whether upon the evidence of the "tindal" there was in law a deviation such as to relieve the defendant from his liability ?

8. On the 11th January, three days after judgment was delivered, the defendant's solicitors requested another question to be submitted, viz., "Whether having regard to the value of the goods in question as stated in the manifests put in at the trial of the suit, the plaintiff can recover upon the basis of the value inserted in the policy." I do not think I should be justified in allowing this question, as the plaintiff was not questioned on this matter, and no point was made of it at the hearing. The question was proposed too late, looking at the wording of section 69 of the Small Cause Courts Act.

JUDGMENT OF THE HIGH COURT.

We answer the first question in the affirmative ; second question in the negative and for the plaintiff.

Costs to be costs in the cause.

1896.

July 3.

ISHWARDA'S TRIBHOVANDA'S, PLAINTIFF, versus KALIDA'S BHAI DA'S AND OTHERS, DEFENDANT.*

Presidency Small Cause Courts Act (XV. of 1882) section 69—Existence of a question of law &c., a condition precedent to a case being stated for the opinion of the High Court—Duty of the Judge in stating a case.

Section 69 of the Presidency Small Cause Courts Act (XV. of 1882) makes it a condition precedent to a reference for the opinion of the High Court, that a question of law, or usage having the force of law, or as to the construction of a document, which may affect the merits, arises in the case. If upon the findings of the Judge no such question arises, the Small Cause Court has no authority to refer the case, and the High Court has no jurisdiction to deal with it.

The section, moreover, imposes on the Small Cause Court the duty of drawing up the case, and that Court is responsible for the form of the case which it submits.

* Reported at I. L. R. 20 Bom, 779.

CASE stated for the opinion of the High Court under section 69 of the Presidency Small Cause Courts Act (XV. of 1882) by C. W. Chitty, Chief Judge.

1. This was a suit brought by the plaintiff to recover from the 4th defendant possession of a diamond buckle said to be worth Rs. 1,500, and, in case the 4th defendant should be held entitled to retain the buckle as security for moneys advanced upon it, the plaintiff further claimed that the 1st, 2nd, and 3rd defendants, or some, or one of them, might be decreed to pay to the plaintiff as damages for breach of duty such sum as might be held to be due on the security of the said buckle.

2. The facts of the case and the reasons for my decision are fully set out in my written judgment, a copy of which is hereto annexed, and to which I crave leave to refer. As therein stated I dismissed the suit and certified Rs. 90 as the professional costs of the 4th defendant. The conduct of the 2nd and 3rd defendants was such as, in my opinion, to disentitle them to any award of costs. I had no doubt that the plaintiff had been unjustly deprived of the buckle, but for the reasons stated I was of opinion that he could not recover it back in this suit.

3. At the request of the plaintiff I made my judgment contingent upon the opinion of the High Court. The questions suggested by the plaintiff's counsel are as follows :

(1) Whether a broker to whom goods are entrusted "*jangad*" with a fixed price, can at his option, and without the consent of the owner, convert the said entrustment into a sale to himself by failing to return the said goods to the owner within a reasonable time ?

(2) Whether under the circumstances disclosed in the case, and the facts, as found by the Court, the 4th defendant cannot be said to be holding goods (*viz.* the buckle) obtained from the owner by means of an offence or fraud as contemplated by section 178 of the Indian Contract Act ?

(3) Whether under the circumstances found in the case the Court ought not to have passed a decree against the 4th defendant ?

(4) Whether in any event the Court ought not to have passed a decree against the 1st, 2nd, and 3rd defendants, or some or one of them ?

1896.
ISHWARDÁS
TRIBHO-
VANDÁS
vs.
KALIDÁS
BHAI DÁS.

1896.

ISHWARDÁS
TRIBHO-
VANDÁS
vs.
KALIDÁS
BHAI DÁS,

4. With regard to the first question I have no objection to it except that it assumes the character of a *jangad* transaction to be a mere entrustment to a broker. I would add to it the questions as stated in my judgment, viz. :

(1) (a) Whether the plaintiff, having delivered the buckle as *jangad* at a fixed price to the 1st and 2nd defendants, can in any case sue for the return of the buckle ?

(1) (b) Whether the plaintiff's remedy would not be confined to a suit for the price ?

5. As to questions (2) and (3) I have nothing to say except I presume their Lordships will not regard any circumstances of the case except upon the facts found by me.

6. As to question (4) I may say that I was unable to pass any decree against the defendants therein named for the simple reason that the plaintiff did not ask for it. His counsel admitted that under the circumstances the relief which he sought against the defendants 1, 2, and 3 could not be granted. The plaintiff did not (as he might have done) sue those defendants for the price of the buckle, and I understood his counsel to say that all that the plaintiff wanted was a decree for the return of the buckle.

7. The buckle was attached before judgment and remains in the custody of this Court pending the return of this reference. The plaintiff has deposited in Court the amount of the costs awarded and Rs. 50 to meet the costs of reference.

The following was the judgment of the Chief Judge :

In this suit the plaintiff seeks to recover the possession from the 4th defendant of a diamond buckle said to be worth Rs. 1,500, and in case the 4th defendant is held entitled to retain the buckle as security for moneys advanced upon it, he further claims that the first three defendants, or some, or one of them, may be decreed to pay to the plaintiff, as damages for breach of duty, such sum as may be held to be due on the security of the said buckle. This suit is the last phase in a series of proceedings, civil and criminal, which have taken place between the plaintiff and defendants and between the defendants themselves. As the dispute between them is (if I may use the expression) in the nature of a quadrangular duel, it would be difficult, if not impossible, to arrive with certainty as to the true state of the facts in detail. This is, however, in my opinion, unnecessary, as I think I can dispose of this suit, as at present framed, by dealing only with a few facts which are, if not admitted, still sufficiently clear upon the evidence. In the first place I think the plaintiff must be regarded as having been at one time the owner of this buckle. The buckle was in April 1893 pledged to him by Khushal-

chand Utamehand, and as mortgagee the plaintiff sold it, buying it himself through his nominee Kubla Kika for Rs. 1,200. However shady may have been this transaction, it is not in dispute here, and the plaintiff asserts that Khushalchand has ratified the sale. The plaintiff, therefore, must be regarded as the owner of the buckle, when on Posh Sud 2nd, 1950 (9th January 1894), he gave it *jangad* to the 1st and 2nd defendants. This transaction is admitted and is evidenced by the entry in plaintiff's *jangadvahi*. The price of the buckle is there given at Rs. 1,500, and a hoop ring was also given *jangad* at Rs. 125, which was subsequently returned to the plaintiff. The 1st and 2nd defendants took the buckle, alleging that they had a customer in view. The 1st defendant has not appeared before the Court, but it is clear that he had nothing to do with the transactions that followed. The 2nd defendant alleges that on the 3rd Posh Sud, the day after he received the buckle, the plaintiff sold it to him for Rs. 1,200, for which he passed a promissory note to the plaintiff, and arranged that it should be taken into account, when making up the accounts of the sale of a necklace, in which he alleges he was the plaintiff's partner. This story I disbelieve, and hold that no such sale as alleged by the 2nd defendant is proved. The 2nd defendant, holding the buckle *jangad* from the plaintiff, in his turn handed it over to the 3rd defendant. Here again there is a conflict of evidence. The 2nd defendant says that he gave it to the 3rd defendant *jangad*, and produces an entry signed by the 3rd defendant to that effect. The 3rd defendant says that the buckle was pledged with him by the 2nd defendant to secure Rs. 800, the value of a pair of earrings and a further sum of Rs. 150 paid to Manchubhai Dayabhai on 2nd defendant's account. The 3rd defendant in the Police Court at first admitted his signature to the *jangad* entry, but afterwards, when he found what the entry contained, denied it. Before me his denial of the signature was unsatisfactory and he prevaricated much when questioned about it. The pledge to him is not proved by any extraneous evidence, and I incline to the belief that he too received the buckle *jangad*. This was on 27th January 1894, eighteen days after the buckle had been received from the plaintiff. The 3rd defendant in his turn handed over the buckle to the 4th defendant. There is no dispute that in this case it was handed over by way of pledge to secure moneys advanced by the 4th defendant to the 3rd defendant. The date of this pledge was 4th Falgun Sud 1950. The debt now due to the 4th defendant on the security of the buckle amounts to over Rs. 1,800. I need not go through the details of the various Police Court proceedings which have been going on during the past year and a half. They have all for one reason or another fallen through, and the Small Cause Court suit brought by the 3rd defendant against the 4th defendant was also dismissed. The sole question for my determination is whether the plaintiff is entitled to recover possession of this buckle, and in my opinion the facts as proved afford two reasons why he cannot do so. In the first place, having delivered this buckle as *jangad* for a fixed price to the 1st and 2nd defendants, could plaintiff in any case sue for the return of the buckle? Would his remedy not be confined to a suit for the price? This question depends on the interpretation of the word *jangad*. The

1896.

ISHWARDÁS
TRIBHO-
VANDÁS
vs.
KALIDÁS
BHADÁS.

1896.

ISHWARDÁS
TRIBHO-
VANDÁS
vs.
KALIDÁS
BHAI DÁS.

plaintiff and defendants have put different meanings on it, or rather given different explanations of what they understand by a *jangad* transaction. I do not, however, rely much on their statements. As I have always understood it, it means given on approval, and this is how it is invariably translated by the translators of this Court. The dictionaries (I have consulted three) give the same meaning with amplifications. The transaction appears to me to be something, if possible, between a "sale on approval" as defined by Mr. Benjamin in his work on Sales, and the transaction known as "sale or return." When the price is fixed, as in this case, there can be no doubt that the buyer would have the right to keep the article at that price, and it is, I think, idle to say that he would be deprived of such right because he was a broker merely, or a broker and dealer. I think the plaintiff is in error in saying the person taking an article *jangad* must come back with it to the seller before the sale can be completed. This might be necessary of course where no price is mentioned, but when the price is fixed, it seems clear that the person taking the article could keep it at that price, whether for sale to another or for his own use. This is no doubt why the price in a *jangad* entry is always put somewhat high in order to avoid any possible loss on the seller's part. If this be so, and a *jangad* transaction possesses the attributes of a "sale on approval" or a "sale or return," it follows that the plaintiff cannot recover the article, inasmuch as the sale became complete when the buckle was not returned within a reasonable time and certainly when second defendant put it out of his own power to recover it back. The plaintiff's only remedy would be to sue the first and second defendants for the price, a remedy of little value, as both these defendants appear to be men of straw. The English cases which bear on this point are quoted in Mr. Benjamin's work (pp. 592 and 899), notably *Moss vs. Sweet*⁽¹⁾; *Exp. Wingfield*⁽²⁾; *Ray vs. Barker*.⁽³⁾ If, however, my opinion on this point be erroneous, there is another objection in the plaintiff's way. On the evidence there seems to be nothing to show that the pledge to the fourth defendant was not a *bona fide* pledge. There is nothing to bring the case within the provisos to section 178 of the Contract Act. In the first place the fourth defendant appears to have acted in good faith and under circumstances which were not such as to raise a reasonable presumption that the third defendant was acting improperly. It was for the plaintiff to prove the contrary, and I do not think that he has succeeded. The fourth defendant says he asked third defendant from whence he got the buckle, and he said that it was his, and that he had bought it from Lukmidás. This may or may not be true, but I have no means of testing the accuracy of the statement. As to the second proviso, I think it is certainly not proved that the buckle was obtained from the plaintiff by means of an offence or fraud. The circumstances of this case are very different from those in *Kartick Churn Setty vs. Gopal Kisto Paulits*,⁽⁴⁾ where the action of the pawnee was such as to raise an irresistible presumption of the offence of cheating. Here the buckle was not pledged till some two months after it left the plaintiff's hands, and then not by the second defendant. The second defendant had

(1) 20 L. J. Q. B. 167.

(2) L. R. 10 Ch. D. 591.

(3) L. R. 4 Ex. D. 279.

(4) I. L. R. 3 Cal. 264.

had similar dealings with the plaintiff subsequently to the delivery of the buckle. On the 8th, 10th, and 11th Posh-Sud he received from the plaintiff some Rs. 12,000 worth of diamonds, which were all duly accounted for, and the hoop ring taken at the same time as the buckle was returned. It is clear that there was no dishonest intention in the second defendant's mind when he received the buckle. If that be so, the pledge must be upheld and the plaintiff must fail.

The suit will be dismissed. Professional costs of the fourth defendant Rs. 90 certified. Judgment contingent on the opinion of the High Court.

Lang (Advocate General) for plaintiff.

Macpherson for fourth defendant.

JUDGMENT OF THE HIGH COURT—(Sir C. Farran, C.J.,
and Strachey, J.)

We have considerable difficulty in dealing with the questions submitted to us in this case owing to the form in which they are framed. After the statement of facts drawn by the Judge himself, follows a series of questions suggested by the plaintiff's counsel, some of which (questions 2 and 3) virtually involve for their solution an inquiry as to whether the findings of fact by the Chief Judge are correct. The learned Judge evidently himself felt that this was so, since he adds a paragraph (5) to the case to narrow their scope, but even when so narrowed, it is difficult to ascertain what particular question of law they are intended to raise.

Section 69 of the Presidency Small Cause Courts Act, 1882, makes it a condition precedent to the drawing up of a statement of the facts of the case by the Small Cause Court, and referring it for the opinion of the High Court, that a question of law, or usage having the force of law, or as to the construction of a document, which may affect the merits, arises in the case. If upon the findings of the Judge no such question arises, the Small Cause Court has no authority to refer the case for the opinion of the High Court, and the High Court has no jurisdiction to deal with it. The section, moreover, imposes on the Small Cause Court the duty of drawing up the case, and though in framing it that Court may well invite the assistance of the parties and give weight to their suggestions, yet it ought not to send up questions which involve the High Court in the dilemma of either entering upon matters of fact or refusing to answer the questions as drawn in such a form as to involve the

1896.
ISHWARDÁS
TRIBHQ-
VANDÁS
VS.
KALIDÁS
BHADÁS.

1896.

ISHWARDÁS
TRIBHO-
VANDÁS
vs.
KALIDÁS
BHADÁS.

assumption which the facts, as found by the Judge, do not warrant. We would point out that the Small Cause Court is itself responsible for the form of the case which it submits for the opinion of the High Court.

The first question, involving an assumption which the facts found in the judgment of the Small Cause Court do not warrant, we leave unanswered, and deal with it in the form proposed by the Judge himself. In that form it involves an almost self-evident proposition.

The term "*jangad*" has several meanings. When goods are delivered "*jangad*," it is a question of fact in each case as to the terms upon which they are delivered. When, as found here, they are delivered upon the condition that if not returned within the stipulated time, whether fixed definitely or ascertained by the course of dealing between the parties, they are to be considered as sold to the person to whom they are delivered at the price fixed upon, then the person delivering the goods cannot, after the expiration of such fixed period, receive the goods back, but his right is to sue for the price.

The second and third questions, as narrowed by the Small Cause Court, we answer in the negative, and also the fourth question, which can, however, hardly under the circumstances stated, be said to be question of law. The decree of the Small Cause Court will therefore stand. Costs to be costs in the cause.

1896.

July 10.

GORDHUNDA'S JADAVJI, PLAINTIFF, versus HARIVALABHDA'S
BHADA'S, DEFENDANT.*

*Minority—Guardian appointed by the High Court—Act IX. of 1875, section 3
—Act VIII. of 1890, section 52.*

Where the High Court appointed a guardian, both of the person and property, of a defendant before he attained the age of 18 years, the requirements of section 3, of Act IX. of 1875, were held to have been complied with, and that he attained his majority on completing his age of 21 years and not before.

Held, that the effect of any appointment of a guardian of a minor and the assumption by the Court of Wards of the superintendence of his property was the same; and such effect should flow from the mere appointment of the guardian or assumption of superintendence by the Court of Wards without regard to the circumstances whether the appointment or superintendence continued or not.

* Reported at I. L. R. 21 Bom. 281.

CASE stated for the opinion of the High Court by Rastamji Merwanji Patell, Second Judge, under section 63 of the Presidency Small Cause Courts Act (XV. of 1882).

1. This was an action on a promissory note for Rs. 501, dated the 24th August 1892, and interest thereon Rs. 89-9-0.

2. The defendant pleaded minority, and the full payment of the promissory note. I held the defendant was of age at the making of the note, and, allowing Rs. 209 only as payment proved, I passed a decree for Rs. 342, including interest and costs, contingent on the opinion of the High Court on the question of minority.

3. The defendant was born on 20th August 1873, or Shrawan Vud 13th 1929. At the date of the execution of the note he was 19 years and 4 days old, but it was contended that he was a ward of the High Court, and till he completed his 21st year he should be considered a minor under section 3 of the Majority Act (IX. of 1875) and section 52 of the Guardian and Wards' Act (VIII. of 1890).

4. The following facts were proved:—(a) Under a decree of the High Court dated the 4th March 1884, in the suit of *Hurkissondás Pranjiwandás* vs. *Pursotum Pranjiwandás*, one Purbhudás Gordhundás was appointed guardian of the person and property of the defendant (Exhibit No. 1). (b) Under an order of the High Court dated 5th May 1890, one Ramdás Manecklal was, on his application, appointed guardian of the defendant's person in place of the said Purbhudás Gordhundás. By the same order the said Purbhudás was asked to hand over the property of the defendant to Mr. Watkins, who had been appointed Receiver in the said High Court suit. Mr. Watkins is spoken of in that order as a Receiver and not as guardian of the property of the minor (Exhibit No. 2). (c) On 26th June 1891, the said Ramdás Manecklal was ordered to be discharged from his office as guardian of defendant's person upon his rendering accounts to the Master in Equity. He was subsequently discharged as such on the 25th June 1892 on the Master passing his accounts as per certificate of that date (Exhibit No. 3). No other guardian of the defendant's person was thereafter appointed, and the defendant was then of the age of 18 years and 10 months. (d) Defendant applied to the High Court by his affidavit dated 19th September 1892, that Mr. Watkins, the Receiver, should be ordered to hand over to him all his property. In paragraph 11 he stated that he had arrived at

1896.

GORDHUNDÁS
JADAVJI
vs.
HARIVALABH-
DÁS
BHADÁS.

1896.

GORDHUNDÁS
JADAVJI
vs.
HARIVATARBH-
DÁS
BHAI DÁS.

the age of majority and was of the age of 19 years and . . . months and was sufficiently competent to manage his estate without the assistance of any Receiver (copy affidavit put in by consent, Exhibit A). The High Court thereupon ordered, on the 22nd October 1892, that Mr. Watkins be discharged as such Receiver, and that he should hand over the property of the defendant to him (Exhibit No. 5).

6. The promissory note sued on having been executed on the 24th August 1892, was, therefore, passed at a time when there was no guardian of the defendant's person or property. I was of opinion that the order directing Mr. Watkins, the Receiver, appointed under the Civil Procedure Code in the said High Court suit, to take charge of the property of the defendant did not constitute him a guardian of the minor's property. (See section 52 of Act VIII. of 1890.)

7. The defendant's solicitor relied on *Rudra Prokash vs. Bhola-nath*⁽¹⁾ and *Bujmohun vs. Rudra Perkash*.⁽²⁾ These cases are based on the provisions of Bengal Act XL. of 1858, which do not apply to Bombay; and the ruling in the former case is not followed by the latter, the Court holding that it was clear from section 3 of the Majority Act that the disability of the minority only continued as long as the Court of Wards retained charge of the minor's property and no longer. (See page 949.) The case of *Yeknath vs. Warubai*⁽³⁾ is based on Act XX. of 1864, which does not apply to Bombay.

8. Reading section 3 of the Majority Act as amended by section 52 of the Guardians' and Wards' Act (VIII. of 1890), I was not prepared to hold, in the absence of any Bombay cases, that on account of the mere circumstance that a guardian has been once appointed of a minor's person or property before he has attained his eighteenth year, the disability of infancy would last till the age of 21, whether the original guardian continued to act or not. On the other hand, looking at the conduct of the defendant, the discharge of the guardian of his person on the 25th June 1892, the statements of the defendant in his affidavit of the 19th September 1892, and the consequent release of his property from the hands of the Receiver, I was of opinion that it would be inequitable to stretch a point in his favour.

(1) 1. L. R. 12 Cal. 612.

(2) 1. L. R. 17 Cal. 944.

(3) 1. L. R. 13 Bom. 285.

9. I now respectfully submit the following question for the opinion of their Lordships :

“ Whether under the above circumstances the defendant was a minor at the date of the execution of the note of the 24th August 1892, so as to avoid his liability on the note passed by him.”

1896.
GORDHUNDÁS
JADAVJI
vs.
HARIVALLABH-
DÁS
BHAI DÁS.

JUDGMENT OF THE HIGH COURT—(Sir Charles Farran, C.J.,
and Mr. Justice Strachey.)

FARRAN, C.J.—The question referred for our opinion in this case should, I think, be answered in the affirmative.

Were it not for the doubt expressed in *Yeknath vs. Warubai*,⁽¹⁾ I should have thought that the point was absolutely clear. The words of section 3 of Act IX. of 1875, in so far as they relate to this matter, both in its original and amended form, are : “ Every minor of whose person or property (or of both) a guardian has been or shall be appointed by any Court of Justice, shall be deemed to have attained his majority when he shall have completed his age of 21 years and not before.” The words added to that enactment by section 52 of Act VIII. of 1890 only serve to elucidate its meaning and make it more clear. They explain that a guardian *ad litem* is not within the scope of the section and show that the appointment of a guardian in order to have the effect of extending the period of minority must be made before the minor has attained the age of 18 years. Now in this case a guardian both of the person and property of the defendant has been appointed by the High Court by its decree of the 4th March 1884 before the defendant attained the age of 18 years, and the requirements of the section have been complied with. I can see no escape from that conclusion. The words of the section are free from ambiguity, and we have no warrant to vary their meaning by reading words into it which are not to be found therein, and thus to alter the expressed will of the Legislature. This view is in accordance with the decision in *Rudra Prokash vs. Bholanath*,⁽²⁾ and is not, I think, opposed to the ruling in *Bujmohun Lal vs. Rudra Perkash*.⁽³⁾ When that case is examined it will be found that the *ratio decidendi* is that there was no proof before the Court that a guardian of the defendant had been appointed by a Court of Justice. The Court

(1) I. L. R. 13 Bom. 285.

(2) I. L. R. 12 Cal. 612.

(3) I. L. R. 17 Cal. 944.

1896.

GORDHUNDÁS
JADAVJI
vs.
HARIVALABH-
DÁS
BHAI DÁS.

differed from the decision in *Rudra Prokash vs. Bholanath* only in this, that they considered the appointment of a guardian by a Collector not to be an appointment of a guardian by a Court of Justice, a point not apparently taken in the former case. The ruling as to the defendant's not being at the time of the suit under the jurisdiction of the Court of Wards and his majority not being extended by reason of his once having been so, was permissible under the section as it was then worded. The wording of the section has by Act VIII. of 1890, section 52, been altered in that respect. If it were allowable to have recourse to section 52 of Act VIII. of 1890 to ascertain the intention of the Legislature in framing Act VII. of 1875, the conclusion I should draw would be, that it intended the effect of any appointment of a guardian to a minor and the assumption by the Court of Wards of the superintendence of his property to be the same, and that such effect should flow from the mere appointment of the guardian or assumption of superintendence by the Court of Wards without regard to the circumstances whether the appointment of a guardian or the assumption of superintendence continued or not.

The view which I take of the section was also that adopted by the High Court of Allahabad in *Khwakish Ali vs. Surpu Prasad*.⁽¹⁾ But we have been referred to a later case, *Patesri Partap Narain Singh vs. Champalal*,⁽²⁾ in which the same Court took the opposite view. The Court in the latter case would, I think, have come to a different conclusion had it had before it the language of section 52 of Act VIII. of 1890.

It might have been sufficient to have dealt with this case upon its special facts which show that the defendant continued to have a guardian until after he had attained the age of 18 years, but it is undesirable to have the law left in doubt (so far as this Presidency is concerned) upon this important point. I have therefore dealt with the case in its broader aspects.

STRACHEY, J.—I am of the same opinion. I was at first impressed by the judgment of Sir John Edge, C.J., and Mr. Justice Knox in *Patesri Partap Narain Singh vs. Champalal*,⁽²⁾ but upon consideration I think that that judgment proceeds not so much upon the terms of section 3 of Act IX. of 1875 as upon a speculation or

(1) I. L. R. 3 All. 598.

(2) All. Weekly Notes, 1891, p. 118.

theory as to the object which the Legislature in passing the section had in view. The language of the section is, however, too clear for such speculation to be admissible in applying it. Speaking generally, it lays down that every minor, of whose person or property, or both, a guardian has been appointed or shall be appointed by a Court of Justice before the minor has attained the age of 17 years, shall be deemed to have attained his majority upon completion of the age of 21 years and not before. And we should not be justified in reading into the section an exception that this provision shall not apply where the certificate of guardianship was subsequently cancelled.

If the intention of the Legislature in passing section 3 of the Act has not been fully effected by the language used, the remedy is in the hands of the Legislature itself, but the words as they stand appear to me to be clear. I agree with the Chief Justice that they have been made if possible clearer by the amendment of the section by section 52 of Act VIII. of 1890.

We answer the questions in the affirmative. Costs to be costs in the cause. This will leave the Small Cause Court the power to deal with them in its discretion.

1896.
GORDHUNDÁS
JADAVJI
vs.
HARIVALABH
DÁS
BHAI DÁS.

VELJI HIRJI AND COMPANY, CLAIMANTS, versus BHARMAL
SHRIPAL AND COMPANY, ATTACHING CREDITORS.*

1896.
Aug. 14.

Consignor and consignee—Goods consigned to agent for sale on commission—Hundis drawn against goods and paid by agent—Railway receipts—Equitable assignment of goods by consignor—Goods attached by judgment-creditor of consignor—Claim by agent—Priority—Civil Procedure Code, section 280.

The plaintiff received a consignment for sale on commission from one Ukerda Punja of certain bags of seed, and on receipt of the railway receipts accepted and paid *hundis* drawn against the said goods for Rs. 3,200. On the arrival of the goods they were attached by Bharmal Shripal and Company, judgment-creditors of the consignor.

Held, that the plaintiffs had made specific advances against the goods and were entitled to the goods as against the attaching creditors. The latter occupied the same position as their debtor Ukerda Punja, and had no better claim to the goods than he had. If, after receipt of the advances, the consignor had attempted to prevent the goods reaching the hands of the commission agent, he could have been restrained in injunction.

* Reported at I. L. R. 21 Bom. 287.

1896.

VELJI HIRJI
AND
COMPANY
vs.
BHARMAL
SHRIPAL AND
COMPANY.

Held, also, that at the date of the attachment the goods were in possession of the consignor, by the Railway Company, "on account of or in trust for" the commission-agent under section 280 of the Code of Civil Procedure (XIV. of 1882).

CASE stated for the opinion of the High Court under section 69 of the Presidency Small Cause Courts Act (XV. of 1882) by Rastamji Merwanji Patell, Acting Chief Judge.

1. These were three claimant notices issued under section 278 of the Code calling upon the attaching creditors to show cause why the attachment levied against 562 bags of castor seed in the possession of the B. B. & C. I. Railway be not removed, and why the said goods be not handed over to the claimants who were the consignees under the railway receipts and had advanced Rs. 3,200 on the security of the said receipts.

2. One Ukerda Punja had consigned the goods from Viram-gám for sale on commission in Bombay by the claimants, and drawn four *hundis* against the same for Rs. 3,200. At the consignor's request the claimants had accepted and paid the *hundis* on receiving the railway receipt by post. The goods represented by the receipts were then in transit, and had not arrived in Bombay. The sale of the goods on arrival was to be made on account and at the risk of the consignor, and the proceeds thereof credited to him as against the advance to his debit. On the evidence I was of opinion that the claimants had made an advance by the payment of the *hundis*, of Rs. 2,200 against the railway receipts for 387 bags and of Rs. 1,000 against the receipts for 175 bags.

3. The railway receipts were in the usual form adopted by the B. B. & C. I. and the Rájputána-Malwa Railway and were headed "Goods Receipt Note," the material portion of which was as follows :

"Received from Punja the undermentioned goods for conveyance by goods train, consigned to Velji, at C. B. Station (Carnac Bridge Station). The Railway Company reserves to itself the right of refusing to deliver the goods without the production of the receipt or until the person entitled, in its opinion, to receive them has given an indemnity to the satisfaction of the railway. If the consignee himself does not attend, he must endorse a request for delivery to the person to whom he wishes it made."

4. The goods arrived in Bombay on or about the 22nd of April 1896, and were immediately after attached by the firm of Bharmal Shripal, who had obtained three decrees against the consignor

Ukerda Punja. The claimants then applied for the removal of the attachment, and based their claim on being holders of the railway receipts representing the said goods, (2) on having advanced moneys on the security of the same, (3) on having the property in the goods transferred to them by the delivery of the railway receipts. Their counsel contended that the railway receipts were "documents of title" or "documents showing title to goods," and relied on section 103 of the Contract Act.

5. No evidence was laid before me to prove any custom or mercantile usage to show that merchants in Bombay had in making advances on the security of railway receipts invariably recognized these receipts as "documents of title."

6. I was of opinion that the circumstances of the present case, of an advance made by an agent for his principal on the faith of the railway receipts, did not fall within the purview of either section 108 or 178 of the Contract Act, and that these sections did not apply. In the absence of any specific provision of the Contract Act, I applied the principles of the Common Law as they stood before the passing of that Act, and I was of opinion that the railway receipts were not documents of title or documents showing title to goods. I also held that by the mere delivery of the receipts to the claimants and the subsequent advance made to them, the consignor did not transfer any possession to the consignees. I held that the claimants had neither actual nor constructive possession by attornment of the goods; the possession of the carrier was the possession of the consignor and not of the consignee, the goods having been carried at the risk and on account of the consignor and not at the orders of the consignee.

7. I was of opinion that such railway receipts could not be placed on a higher footing than the delivery orders issued after the arrival of the goods at the railway station, in the case of *Coventry vs. G. E. Railway Company*,⁽¹⁾ which Brett, M.R., held to be non-negotiable instruments that did not pass the property to the pledgees. The wording of the delivery orders in that suit was certainly much stronger than that of the railway receipts in question. I therefore held that the railway receipts could be regarded only as tokens of authority to receive possession and they did not operate to

1896.

VELJI HIRJI
AND
COMPANY
vs.
BEARMAL
SHRIMAL AND
COMPANY.

(1) L. R. 11 Q. B. D. 776.

1896.
 VELJI HIRJI
 AND
 COMPANY
 vs.
 BHARMAL
 SHREIPAL AND
 COMPANY. .

transfer possession, and relied on *Farina vs. Howe*⁽¹⁾ and *McEvan vs. Smith*.⁽²⁾ They could not be likened to bills of lading, and could only be treated as delivery orders or dock warrants at Common Law, which, as Parke, B., said in the former case, were no more than an engagement by the wharfinger to deliver to the consignee or any one he may appoint. I also relied on *The G. I. P. Railway vs. Hanmandás*,⁽³⁾ though it was restricted to the construction of section 103 of the Contract Act as regards an unpaid vendor's right of stoppage *in transitu*, as the reasoning employed by Sir Charles Sargent seemed equally applicable to the circumstances of the present case.

8. I held, therefore, that claimants had no lien against the 562 bags they claimed, and that they failed to establish any right to the possession of them as against the attaching creditor of the consignor, and under section 281 of the Code I disallowed the claim.

9. At the request of the counsel for the claimants my judgment was delivered contingent on the opinion of the High Court. I beg to invite the opinion of their Lordships on the following questions submitted on behalf of the claimants :

(1) Whether the possession of the railway receipts, coupled with the fact of the claimants having made advances on the same, did not in law give the claimants the right to claim the goods represented or carried by such receipts (a) wholly or (b) to the extent of their advances ?

(2) Whether the possession of the Railway Company was not the possession of the claimants after the consignor parted with the railway receipts and obtained advances on the same ?

(3) Whether railway receipts in the hands of a commission agent who has made specific advances against them are not documents of title entitling the agent to claim the goods covered by the receipts against a judgment-creditor of the consignor of such goods ?

(4) Whether the claimants obtained any lien over or property in the goods represented by the railway receipts on the security of which the claimants made specific advances ?

(5) Whether on the facts found the Court was not in error in disallowing the claims.

(1) 16 M. & W. 119.

(2) 2 H. L. R. 309.

(3) I. L. R. 14 Bom. 57.

JUDGMENT OF THE HIGH COURT—(Sir Charles Farran, C.J.,
and Mr. Justice Strachey).

The exact legal relations between the parties in this case do not seem to have been borne in mind with sufficient distinctions by the counsel or pleader who on behalf of the claimants presented the point for his consideration to the learned Chief Judge of the Small Causes Court. It appears from the case as stated that one Ukerda Punja consigned the goods in question from Viramgám to the claimants, Velji Hirji and Company, in Bombay for sale on commission by the latter and drew four *hundis* against the same (*i. e.* against the goods), which *hundis* the claimants' firm accepted and paid on receiving the railway receipts by post. On the arrival of the goods in Bombay, Bharmal Shripal and Company, who were judgment-creditors of Ukerda Punja, attached the same as the property of their judgment-debtor Ukerda Punja. The contest therefore lies between the attaching creditors of Ukerda Punja on the one hand who have attached the goods, and the claimants' firm of Velji Hirji and Company, who had made specific advances against the goods, on the other hand. The claimants' firm have neither sold the goods to a purchaser nor pledged them to a third party, so neither section 108 nor section 178 of the Contract Act has any bearing upon their case.

On the other hand the firm of Bharmal Shripal and Company are not either unpaid vendors of the goods seeking to stop them *in transitu* under section 103 of the Contract Act, nor are they purchasers nor pledgees of the goods. They simply occupy the position of attaching creditors. What that position is has been pointed out with great clearness by Westropp, C.J., in the case of *Meghji Hansraj vs. Ramji Joita*.⁽¹⁾ They occupy exactly the same position as their judgment-debtor Ukerda Punja himself. They stand in his shoes, and are in no better and no worse situation with reference to the goods in question than he would have been in had he sought to prevent the goods reaching the hands of Velji Hirji and Company. It is to our minds clear that Ukerda Punja had he attempted to prevent the goods reaching the hands of the claimants, who had made specific advances against them at his request would have been promptly restrained in the attempt by an injunction.

1896.

VELJI HIRJI -
AND
COMPANY
VS.
BHARMAL
SHRIPAL AND
COMPANY.

(1) 8 B. H. C. R. (O. C. J.) 169.

1896.

VELJI HIRJI
AND
COMPANY
vs.
BHARMAL
SHRIPAL AND
COMPANY.

The case of *Lutscher vs. Comptoir D'Escompte de Paris*,⁽¹⁾ cited, is, our opinion, exactly in point. There the equitable agreement was to place the bill of lading in the hands of the firm who had made advances against it. Here it is to place the goods in the hands of the advancing firm. Mr. Scott with extreme ingenuity contended that the claimants' firm made the advances not on the goods but on the railway receipts, and therefore advanced their moneys on worthless documents which are not like a bill of lading symbols of the goods at all. We do not so read the case. Its second paragraph states that Ukerda Punja drew against the goods and Velji Hirji and Company were to accept and pay the *hundis* so drawn on the receipt of the railway receipts. The rest of the paragraph (2) makes this still more clear. The sale of the goods on arrival was to be made on account of the consignee and the proceeds thereof credited to him against the advances. The Judge no doubt goes on to say, "On this evidence I was of opinion that the claimants had made an advance by the payment of the *hundi* of Rs. 2,200, against the railway receipts for 387 bags, and of Rs. 1,000 against the receipt for 275 bags," but when Ukerda Punja drew against goods, the claimants were to be paid their advances out of the proceeds of the goods. The learned Judge cannot, we think, be taken to mean that he was of opinion that the claimants had made the advance against the railway receipts, but that the particular advances which he refers to were made against the goods specified in the particular railway receipts which he mentions. It comes to this that by agreement between Ukerda Punja and the claimants the latter were to make advances against the goods specified in the railway receipts when they received such receipts, and were to repay themselves their advances out of the proceeds of such goods when they received and sold them. We cannot doubt but that that agreement constitutes a good equitable charge upon the goods as between Ukerda Punja and the claimants' firm, when the rights of these parties do not intervene. We have already stated that the attaching creditors are but the *alter ego* for this purpose of Ukerda Punja. No argument was addressed to us by Mr. Scott based upon the wording of section 280 of the Civil Procedure Code. We do not however think that it offers any difficulty, as, in the view which

(1) L. R. 1 Q. B. D. 709.

we take of the case, we find no difficulty in holding that at the date of the attachment the goods were in the possession of Ukerda Punja by the Railway Company "on account of or in trust for" the claimants in the comprehensive sense in which that expression is used in the section.

We notice the point lest it might be thought that we had overlooked it. The only doubt which we have felt in the matter is whether, as the aspect of the case which we have been above considering was not presented to the Acting learned Chief Judge, and was probably not present to his mind when he was stating the case and framing the questions to be submitted to this Court for opinion, we ought to give our opinion upon it. But we think that as the question (5) "Whether on the facts found the Court was not in error in dismissing the claim," is in the widest possible terms, we are at liberty to determine it, and as the facts are all before us, that we ought not to make shipwreck of a good cause upon the rock of overfine technicality by refusing to entertain it. We answer the 5th question in the affirmative, but do not consider it necessary to answer the other questions submitted for our opinion, as our answer to the 5th question is sufficient to dispose of the case. Costs of the reference will be costs in the case.

THE IMPERIAL BANK OF PERSIA, PLAINTIFFS, VERSUS
FATEHCUND KHUBCHUND, DEFENDANT.*

Hundi—Suit by holder and indorsee against payee and indorser—Presentment to acceptor—Local usage at Bushire as to presentment—Negotiable Instruments Act XXVI. of 1881 sections 70, 71.

Plaintiffs were holders and indorsees of a dishonoured *hundi* written in Persian character. The *hundi* was presented for payment to the authorised agent of the acceptor. It was argued that the presentment did not satisfy the requirements of the Negotiable Instruments Act.

Held, that the local usage at Bushire was to present the *hundi* for payment at the bank and for the acceptor to call at the bank on the due date and effect settlement.

Held, also, that having regard to section 75 the presentment was a good presentment under the Act.

CASE stated for the opinion of the High Court by Rastamji Merwanji Patell, Acting Chief Judge.

* Reported at I. L. R. 21 Bom. 294.

1896.

VELJI HIRJI
AND
COMPANY
VS.
BHARMAL
SHRIPAL AND
COMPANY.

1896.

Oct. 2.

1896.

THE IMPERIAL
BANK OF
PERSIA
vs.
FATEHCUND
KHUBCHUND.

1. This was a suit by the holders and indorsees of a *hundi* written in the Persian character and drawn in Bombay on one Haji Mirza Ahmed Shirazi for 350 Tumans payable fifty days after date. The defendant was the payee and indorser of the *hundi*. The plaintiffs sent the *hundi* from Bombay to their Branch Bank at Bushire, and it was accepted by the drawee and became due and payable at Bushire on the 4th of August 1895. On that day the acceptor refused payment, and plaintiffs, after due notice to the defendant in Bombay, filed this suit to recover Rs. 1,193-4-0 as on a dishonoured *hundi*.

2. The case first came on for hearing on the 11th May 1896, when the only defences raised were want of notice of dishonour, and payment of the *hundi* either in whole or in part by the acceptor. On the application of the defendant's solicitor a commission was issued to Bushire to prove the plea of payment.

3. On the return of the commission the suit was heard on 10th August last when the plea of payment was abandoned by the defendant's solicitor, and a fresh defence raised denying that the presentment for payment to the acceptor was made as required by the Negotiable Instruments Act.

4. The plaintiffs relied on the evidence of the manager, accountant, and clerk of the Bank at Bushire as taken on commission on the defendant's behalf, and I held as proved, 1st, that the *hundi* was presented for payment to the authorised agent of the acceptor at the Bank on the due date, (2) that the said agent refused payment and informed the Bank that the acceptor would not pay that *hundi*, (3) that the local usage or custom at Bushire was to present *hundis* for payment at the Bank and for acceptors of *hundis* to call at the Bank on the due date to effect settlement.

5. For the defence it was argued that reading sections 70, 71, and 137 together, the presentment at the Bank could not be held valid, and that the suit must fail. This defence was disallowed, as I held that the latter part of section 137 should be read with the proviso to section 1, which provides that nothing contained in the Act affects any local usage relating to any instrument in an oriental language. I was of opinion that in the case of native *hundis* the rules of English Law were not strictly applicable, and gave judgment for the plaintiff.

6. At the request of the defendant's solicitor I beg respectfully to submit the following question for their Lordships' opinion :

Whether under the circumstances hereinabove mentioned, and referring to the proviso as to local usage in section 1 of the Act, the presentment at the Bank was a presentment that satisfied the requirements of the Act ?

7. The defendant has paid into Court the amount of judgment and professional costs, with Rs. 50 for costs of reference.

JUDGMENT OF THE HIGH COURT—(Sir Charles Farran
and Mr. Justice Strachey.)

As we read the case, the local usage or custom found as prevailing in Bushire does not exclude the usual presumption which accords with the law as laid down in section 75 of the Negotiable Instruments Act, that what a person can himself do he can do by an authorised agent. Reading it in that light we have no doubt that the local usage in this case makes the presentment a good presentment, and that the question referred to us must be answered in the affirmative.

Costs of reference to be costs in the suit, to be taxed as on the Original Side of the High Court.

FATMABÁI, WIDOW, AND JAN MAHOMED JETHA, HEIRS AND
LEGAL REPRESENTATIVES OF THE LATE MAHOMED JAN
MAHOMED, PLAINTIFFS, versus PIRBHAI VIRJI, DEFENDANT.*

*Limitation—Act XV. of 1877, section 22—Suit by heirs of deceased Mahomedan—
Filed in time by one heir—Another heir joined as co-plaintiff beyond time of limitation—Letters of Administration obtained only by second plaintiff—Suit barred.*

Plaintiff, as widow and heir of a Khoja, sued on a promissory note passed to her deceased husband. She applied to the High Court for letters of administration. Her father-in-law was added as a co-plaintiff in the suit, and finally the High Court granted to him alone letters of administration. He was so added after the claim on the promissory note was barred.

Held, that the second plaintiff was properly joined as party-plaintiff, but the suit was barred as against him under section 22 of the Limitation Act when he was so added. If the letters of administration had been obtained by the plaintiff Fatmabái, her suit would not have been barred.

* Reported at I. L. R. 21 Bom. 580.

1896.

THE IMPERIAL
BANK OF
PERSIA
vs.
FATEHCUND
KHUBCHUND.

1897.

Jan. 29.

1897.

FATMABÁI
vs.
PIRBHAI
VIRJI.

Held, also, section 22 of the Act applies as well to plaintiffs suing in their representative capacity as in their personal capacity.

CASE stated for the opinion of the High Court under section 617 of the Indian Civil Procedure Code by C. M. Cursetji, Third Judge.

1. The following are the facts of the case. This suit was originally filed by the first plaintiff Fatmabái alone on the 9th October 1895 as the widow and heir and legal representative of Mahomed Jan Mahomed, deceased. The claim is on a promissory note of Rs. 500, dated 21st October 1892, passed by the defendant to the said Mahomed Jan Mahomed. The summons in suit was not served till the 18th January 1896. Meantime disputes having arisen between the said plaintiff Fatmabái and her father-in-law Jan Mahomed Jetha about the succession to the property of the said deceased, Fatmabái applied to the High Court for letters of administration. Pending such application, the defendant appeared in this suit with his vakil, Mr. Rele, on the 25th March last. He admitted this claim to be due, but denied Fatmabái's right to recover the debt without letters of administration or certificate of heirship under Act VII. of 1889. It was also urged by the defendant that Jan Mahomed Jetha claimed from him the same debt as heir and legal representative of his son the said Mahomed Jan Mahomed. This suit continued to be postponed from time to time pending the disposal of Fatmabái's application for letters of administration. On 9th September last Mr. Manchashanker appeared on behalf of the said Jan Mahomed Jetha and applied that his client be made a co-plaintiff with the consent of the plaintiff Fatmabái. This application was granted and the summons was accordingly amended by making the said Jan Mahomed Jetha party-plaintiff with Fatmabái. On the 14th November last this suit coming finally on the board, the second plaintiff, the said Jan Mahomed Jetha, produced letters of administration to the estate of his son, the said Mahomed Jan Mahomed, obtained by him alone. The first plaintiff Fatmabái did not produce any such letters nor any certificate under Act VII. of 1889. It appears the plaintiffs having come to terms, the first plaintiff withdrew her application for letters of administration and allowed the second plaintiff to take out the same. She has in fact practically assigned over her claim and all interest in this suit to the second plaintiff. The plaintiffs are Khoja Musalmans, they are the only

surviving heirs of the said Mahomed Jan Mahomed deceased, and they and the said deceased had been living together as members of a joint family.

2. The defendant now pleads that this suit is barred under section 22 of the Indian Limitation Act of 1877. The questions which thus arise and which I have the honour to refer as aforesaid, are, 1st, Is the plaintiff No. 2 properly joined as party-plaintiff; and 2nd, If yes, then on the facts and under the circumstances above stated, is this claim barred as against him?

3. As to the first question, I am of opinion that the second plaintiff was properly made a co-plaintiff. The case—*Chunder Kumar vs. Goool*⁽¹⁾—relied on by Mr. Rele in support of the contrary contention does not, it appears to me, apply. There the person who originally filed the suit was held to have had no cause of action or interest in the suit. In the present case the plaintiffs are co-heirs. As Khoja Musalmans they have both a beneficial interest in the estate of the deceased, and whereas in this case, one of such heirs sues on behalf of the estate and what appears to be practically a plea of non-joinder of plaintiffs is raised, the only right course is to join all the heirs. It hardly lies in the defendant's mouth to object to this being done, seeing he admits the debt to be due to the estate, and the second plaintiff has been joined for defendant's greater security.

4. As regards the second question, I am of opinion that the claim is not barred. Section 22 of the Indian Limitation Act provides that "when after institution of a suit a new plaintiff or defendant is substituted or added, the suit shall as regards him be deemed to have been instituted when he was so made a party." If the second plaintiff in this suit is to be held a new plaintiff under section 22, then as against him this suit is clearly barred, with the result moreover that this claim must fail totally, since no decree could be passed in favour of the first plaintiff according to section 4 of Act VII. of 1889.

5. It seems to me there can be no doubt but that the principle of the Act of Limitation is to save persons who honestly believe they have paid their debt or are unable through lapse of time to recollect if they have done so or not from having to pay them over again. In practice, however, it often happens that it is the dishonest

1897.
FATMABAI
vs.
PIRBHAI
VIRJI.

(1) I. L. R. 6 Cal. 370.

1897.

FATMABAI
vs.
PIEBHAI
VIRJI.

debtor who takes advantage of the bar of limitation. In this case the defendant admittedly owes the money as a just debt and is yet attempting to evade paying it. If the law be clear, the Court is helpless to frustrate such an attempt, however hard the case may be.

6. The question then is, Is it open to the Court to so construe section 22 of the Limitation Act so as to exclude from its operation such a case as the present? It is well established that the provisions of the Limitation Act are to be construed as literally as possible, that is to say in favour of a man's right of suit being continued and not curtailed. "*Res majis valeat quam pereat.*" This maxim has doubtless been the guide followed by the Courts in many cases similar to the present case. (See *Suput Sing vs. Imrit Tewari*,⁽¹⁾ *Ganpat vs. Adarji*,⁽²⁾ *Boydonth vs. Grish Chunder*,⁽³⁾ *Sominath vs. Muthayya*⁽⁴⁾).

7. It is clear section 22 applies only to new parties in their personal capacity. The plaintiffs in the case are on the record in their representative capacity. It is the estate of the deceased creditor, as it were, that makes this claim and brings this suit. The debt claimed is due to the estate represented by the plaintiffs. The defendant has had full notice of the claim within the period of limitation when the first plaintiff brought this suit. In such a case then it may well be held that the later addition of other heirs is a mere formality and not any adding of new parties to whom section 22 could be made applicable. When a suit was brought in the name of a firm only and the partners or proprietors were not brought on the record till after the bar of limitation had attached, it was held that section 22 did not apply. (See *Kustoorchund vs. Sagarmul*⁽⁵⁾ and also *Manni vs. Crook*,⁽⁶⁾ *Pragilal vs. Maxwell*⁽⁷⁾). The present case is in a great measure analogous to this and the *ratio decidendi* adopted in the cases just above noted would, I submit, equally apply here.

8. Mr. Rele for the defendant strongly relies on the case of *Chunder Kumar vs. Gocool*⁽⁸⁾. The facts of that case are certainly much the same as those of this case above detailed. That case, however, is capable, I think, of being distinguished. That case does

(1) I. L. R. 5 Cal. 720.

(3) I. L. R. 3 Cal. 26.

(5) I. L. R. 17 Bom. 413.

(7) I. L. R. 7 All. 284.

(2) I. L. R. 3 Bom. 312.

(4) I. L. R. 15 Mad. 417.

(6) I. L. R. 2 All. 296.

(8) I. L. R. 6 Cal. 370.

not deal with section 22 of the Indian Limitation Act at all: there was no difficulty there as regards limitation. That case mainly decides that the second plaintiff there had been wrongly joined as a co-plaintiff because the plaintiff who had originally filed the suit had no right of suit at all, regard being had to section 2 Act of XXVII. of 1860.

I doubt much if the High Court will acquiesce in the correctness of that ruling. Section 2 of the said Act did not preclude a plaintiff bringing a suit or deny his right of suit. It merely postponed his right to payment of the debt till the production of a certificate to collect such debt. To save limitation suits have been frequently allowed to be filed prior to the plaintiffs having obtained certificate under Act XXVII. of 1860 or letters of administration. (See *In re Petition of Ramdas*,⁽¹⁾ *Lachmun vs. Gungaprusad*,⁽²⁾ *Govindappa vs. Kondappa*,⁽³⁾ *Janaki vs. Hafiz Mahomed*.⁽⁴⁾) At present, under section 4 of Act VII. of 1889, this is still more clearly provided for, and it is this latter Act that applies to the present case. The wording of section 2 of Act XXVII. of 1860 was quite different, and moreover that Act is now wholly repealed. The Calcutta ruling in question may for these reasons be taken as no longer binding.

9. I have accordingly passed a decree for the amount claimed and costs in favour of the plaintiff No. 2 contingent on the opinion of the Honourable the High Court.

JUDGMENT OF THE HIGH COURT—(Sir Charles Farran, C.J.,
and Mr. Justice Candy.)

We think that the second plaintiff was properly joined as party-plaintiff. Section 4 of Act VII. of 1889 does not preclude the heirs of a deceased Khoja from filing a suit to recover a debt due to his estate, but only prevents the Court from passing a decree in favour of such heirs except on the production of probate or a certificate of the nature referred to in the section. When one or more heirs sue, there is no objection to joining all to make the representation complete so far as it can be complete without probate or a certificate.

The answer to the second question depends substantially upon this—Whether an heir of a deceased Mahomedan added as a party

1897.
FATMABAI
vs.
PIREBHAI
VIRJI.

(1) I. L. R. 10 Bom. 107.

(2) I. L. R. 4 All. 485.

(3) 6 Mad. H. C. Rep. 131.

(4) I. L. R. 13 Cal. 47.

1897.

FATMA BAI
VS.
PIEBHAI
VIRJI.

in a suit to recover a debt due to the deceased is a "new plaintiff" within the meaning of section 22 of the Limitation Act. If he is, it follows that when the plaintiff Jan Mahomed was added as a plaintiff the suit was barred as regards him, and the fact that he subsequently obtained letters of administration to the estate of the deceased cannot, we think, operate to remove that bar. If the letters had been granted to Fatma, her suit clearly would not have been barred and the Court could have passed a decree in her favour. It is, it must be allowed, a curious anomaly that the result of the suit should depend, in so far as limitation is concerned, upon which of the plaintiffs took out letters of administration to the estate of the deceased. But, though we cannot help regretting the result, we feel constrained to hold that the section in terms applies as well to plaintiffs suing in their representative as in their personal capacity. The proviso to it shows, we think, that plaintiffs suing in their representative capacity are plaintiffs within the contemplation of the Legislature. As to that particular class of plaintiffs when the action has been instituted in the life-time of the deceased, it shall, as regards them, be deemed to have been instituted when the deceased filed it. No special provision is made for representatives suing after the death of their intestate or testator. The same reasoning seems to us to apply to them as was held to apply to the joint surviving co-parceners in a Hindu family in *Kalidas vs. Nathu*.⁽¹⁾

When it is once allowed that representative plaintiffs are within the scope of the section it seems to us to follow that the adding of a plaintiff in his representative capacity (the suit being filed after the death of the intestate) is the adding of a new plaintiff within the section. The representatives are the plaintiffs who sue. The estate is not a person capable of filing a suit.

Counsel for the plaintiffs relied on the ruling in *Subodini Debi vs. Cumar Ganoda*,⁽²⁾ and from it asked us to draw the deduction that when the only change made in a suit is in adding or substituting parties for the purpose of more correctly representing the right originally asserted, the change is not within the scope of the section. It is not, however, easy to reconcile that decision with the exact wording of section 22 of the Limitation Act, and it would be unsafe

(1) I. L. R. 7 Bom. 217.

(2) I. L. R. 14 Cal. 400.

to rely upon any general deductions drawn from it. The case of *Kasturchand vs. Sagarmul*⁽¹⁾ and *Pragilal vs. Maxwell*⁽²⁾ were also relied on, but they were decided upon the ground that all the partners in the firm sued were impliedly made defendants in the suit brought against the firm sued in its own name and are obviously not authorities upon the question before us.

To prevent hardship it might be desirable to lay down the law in the sense contended for by Mr. Anderson, but it seems to us that if we were to do so, we should be making and not interpreting the law. If the law is too stringent it is for the Legislature and not for the Courts to mitigate its severity. Its provisions do appear to us to operate harshly as well in the case of the representatives of a deceased person as in the case of joint promisees, but in the former case any plaintiff by taking out letters of administration to the estate of the deceased can relieve himself of the apparent hardship. We answer the second question in the affirmative. Cost to be costs in the case.

FULCHAND GOPALCHAND BHAYA, PLAINTIFF, versus
HARI VITHAL GUIDE AND ANOTHER, DEFENDANTS.

Presidency Small Cause Courts Act (XV. of 1882) section 69—Court must state case on a question of law if required, even where it entertains no doubt—Question of law, what is.

Section 69 of the Presidency Small Cause Courts Act (XV. of 1882) renders it incumbent upon the Small Cause Court to draw up a statement of the facts and refer such statement under section 617 of the Civil Procedure Code (Act XIV. of 1882) if a question of law arises in a suit and a party so requires, even though the trying Judge may not himself entertain reasonable doubt upon the question.

It cannot be laid down as a general absolute rule that a question ceases to be a question of law when there has been a decision of the High Court upon it.

CASE stated for the opinion of the High Court under section 69 of the Presidency Small Cause Courts Act (XV. of 1882) by C. W. Chitty, Chief Judge.

1. This was a suit brought by the plaintiff to recover from the defendants a sum of Rs. 1,276-4-0, being the principal sum, together with interest and costs, due on a *hundi* for Rs. 1000, drawn

(1) I. L. R. 17 Bom. 410.

(2) I. L. R. 7 All. 284.

1897.
FATMABAI
vs.
PIRBHAI
VIRJI.

1897.
Sept. 10.

1897.

FULCHAND
GOPALCHAND
BHAYA
vs.
HARI VITHAL
GUIDE.

by the first defendant on Sakharam Mancharam in Bombay in favour of the second defendant, and transferred to the plaintiff by the second defendant, which *hundi* was dishonoured on presentation.

2. The facts of the case, which are not in dispute, and the reasons for my decision are fully stated in my judgment, a copy whereof is hereto annexed, and to which for brevity's sake I crave leave to refer. For the reasons there stated I passed a decree in favour of the plaintiff for the full amount claimed against both defendants, and awarded professional costs against the first defendant, who alone appeared to defend the suit.

3. At the request for the first defendant I made my judgment contingent on the opinion of the High Court, and his pleader submitted the following questions for reference :

(1) Whether Sidappa bin Tatyā Sheti was a recognised agent within the meaning of section 37 of the Code of Civil Procedure, and whether he was a person duly authorised to sign the plaint within the meaning of section 51 of the said Code ?

(2) Whether the plea of non-joinder of Sidappa bin Tatyā Sheti as party-plaintiff taken by first defendant at the first hearing would not include the non-joinder of Amirmul Hazarimul, who was discovered to be the plaintiff's partner only at a subsequent hearing on the admission of Sidappa bin Tatyā Sheti ?

(3) Whether having regard to section 45 of the Indian Contract Act the Court was justified in proceeding with the suit after this discovery without joining the said Amirmul as party-plaintiff ?

(4) Whether the Court was right in refusing to allow evidence to be given of local usage obtaining at Sháhpur to the effect that the figure (1) at the top of the *hundi* represented the number of days after which the *hundi* was payable ?

(5) Whether the letter, Exhibit E., constituted the plaintiff the owner of the *hundi*, or merely an agent for a specific purpose only, viz. to sell it, and to credit the sale-proceeds thereof to the account of Khetsi Aso ?

(6) Whether having regard to the fact that the *hundi* was made payable to a specified person, viz. Khetsi Aso, refusal by

the drawee to pay the same on presentation by some person other than the payee would confer on the plaintiff the right to recover the amount of the *hundi* from the drawer?

4. To question (1) there are two objections, (a) that it is not a question of law, and (b) that it was decided on a preliminary issue, and, my judgment having been delivered upon it without any request for a case to be stated, it cannot now form a part of this reference. If their Lordships think that the first defendant can now reopen this question, then the facts are as follows:—The plaintiff has three *pedhis*, at Sholapur, Bágalkot, and Bombay. He himself resides at Sholapur. Sidappa bin Tatya is the *vahivatdar*, or manager, of the Bágalkot *pedhi*. The *hundi* in question was transferred to the plaintiff at Bágalkot, and he sues as owner of that *pedhi*. It appeared to me that Sidappa bin Tatya Sheti fell distinctly within that class of recognised agents described in section 37 (c) of the Civil Procedure Code. As to the signature of the plaint, the case might have been adjourned to permit of its being signed by the plaintiff himself, but I considered that such a course was unnecessary.

5. As to question (2) the answer appears too obvious, and I fail to see how a plea of non-joinder of A. could be held to be an objection to the non-joinder of B., of whose existence the defendant was at the time unaware, and which he did not discover until it was too late for him to raise any objection at all. To hold otherwise would be to render section 34 of the Civil Procedure Code practically nugatory.

6. Before submitting question (3) I would respectfully request an expression of their Lordships' opinion on a general question which might be marked (2) (a), and which is:—Whether a party is entitled to claim a reference to the High Court on a question of law, on which the Court entertains no reasonable doubt, where the point has been definitely decided by the High Court. In section 69 of the Presidency Small Cause Courts Act (XV. of 1882) nothing is said as to the entertainment of doubt by the Court. It does, however, prescribe that the reference shall be made under section 617 of the Civil Procedure Code, in which section those words occur. I would submit that the two sections must therefore be read together. To hold otherwise would be to

1897,
FULCHAND
GOPALCHAND
BHAYA
VS.
HARI VITHAL
GUIDE.

1897.

FULCHAND
GOPALCHAND
BHAYA
vs.
HARI VITHAL
GUIDE.

encourage litigious parties to harass and annoy the opposite side by submitting idle questions, and also to delay materially the execution of the decrees passed against them.

7. If however their Lordships are of the contrary opinion, then I submit question (3), with this remark that the point has already been determined by the Appeal Court (Sir Charles Sargent, C.J., and Telang, J.) in the case of *Shirekuli Timappa Hegade vs. Ajjibal Narashinn Hegade*.⁽¹⁾

8. As to question (4) I have nothing to say beyond what has been already stated in my judgment.

9. As to question (5) it appears to me a question of fact rather than law. I found as a fact that the *hundi* was duly transferred to the plaintiff at his Bágalkot *pedhi*. It should be borne in mind that the *hundi* is not a negotiable instrument, and is not therefore governed entirely by the provisions of the Negotiable Instruments Act.

9. The last remark applies also to question (6). The only question as to presentment raised before me was, whether the *hundi* was presented for payment within a reasonable time. The point raised by question (6) was not raised at the trial, but I submit that Khetsi Aso had a perfect right to transfer his interest in the *hundi* to a third party, who in his turn could enforce his rights by a suit. The question arising as to the transfer under the Transfer of Property Act I have dealt with in my judgment. I might express a doubt as to whether that Act would apply to a transfer made in a native State, though intended to take effect in British India.

11. The first defendant has deposited in Court the amount of the decree and costs and Rs. 50 to meet the costs of reference.

The following was the judgment of the Chief Judge :

This is a suit brought by the plaintiff to recover the sum of Rs. 1,276-4-0, being the principal sum, together with interest and costs, due on a *hundi* for Rs. 1,000 drawn by the first defendant in favour of the second defendant and transferred by the latter to the plaintiff, which *hundi* was dishonoured on presentation. The plaintiff carries on business in his own name at Sháhápúr, Bágalkot, and Bombay. The first defendant is a legal practitioner residing at Belgaum ; the second defendant trades at the last-mentioned place. There is no dispute as to the facts. The drawing of the *hundi* is admitted. It was transferred to plaintiff

(1) I. L. R. 15 Bom. 297.

at his Bágalkot firm by the second defendant by a letter, in part payment of moneys due on a cotton account subsisting between them. It was then sold by plaintiff to one Lakhmichand Ratanchand, but for some reason, which is not quite clear, it was returned to plaintiff, and was on the 30th May 1893 presented on his behalf in Bombay to the drawee, Sakharam Mancharam, who declined to pay. The suit came on for hearing on the 31st August 1896, when the first defendant raised ten different issues. He at that time denied execution of the *hundi*, and also consideration. These defences have now been waived by him, and he has confined himself to picking holes in the plaintiff's case, and relying on a number of points all more or less technical. I will deal with them in order. The first defendant first pleaded non-joinder of Sidappa bin Tatya Sheti as party-plaintiff. This man is the plaintiff's munim, or as he is termed in the plaint, *vahivatdar*. He actually filed the suit, and if he was a partner it would have been just as easy for him to have filed the suit in that capacity. He here denies partnership, and I am of opinion that partnership has not been proved against him. The only evidence that the first defendant has been able to adduce which is of any value is the fact that before the Magistrate at Sháhápur in a criminal proceeding against Aso Nundji, the second defendant, he admitted that he was a partner. I cannot now weigh the value of that statement. The witness Sidappa denies having made it, and I think it is possible there may have been some mistake. Direct evidence of partnership I have none that I can accept, and I must therefore decide this point against the first defendant. I may perhaps conveniently mention here the other point which arose as to partnership. It transpired during the evidence of Sidappa, which was given before me at the second hearing on the 5th May, that the plaintiff has had a partner, one Amirmal Hazarimal, in his Bágalkot firm for the last twenty years. This man no doubt ought to have been joined as party-plaintiff in the first instance, but no objection having been taken by the defendants in time, such objection must now be taken to have been waived by them under section 34 of the Civil Procedure Code. If the man had been joined now, the suit would have been barred by limitation. I had some doubt whether the Court ought not to take cognizance of such state of things, but it has been definitely decided by the High Court in the case of *Shirekuli Timappa Hegade vs. Ajjibal Narashinv Hegade*,⁽¹⁾ that where the defendants have not taken the objection and have raised no issue on the point, the suit is not barred. It was next contended for the first defendant that the *hundi* was payable one day after sight, and being so, was insufficiently stamped with a one-anna stamp, and therefore inadmissible in evidence. The *hundi* contains the figure "1" by itself at the top, and it was alleged by the first defendant that this, by the local usage of Sháhápur, denoted payment one day after sight. I declined to allow evidence of any such custom as being altogether unreasonable and absurd. This *hundi*, moreover, is expressed to be payable in Bombay, so that the custom or usage to have any effect would have to be proved to extend to Bombay. Even if the figure "1" could bear that meaning, not being in the body of the

1897.

FULCHAND
GOPALCHAND
BHAYA
vs.
HARI VITHAL
GUIDE.

(1) I, L, R, 15 Bom, 297.

1897.

FULCHAND
GOPALCHAND
BHAYA
vs.
HARI VITHAL
GUIDE.

hundi, it would be a separate statement as to payment, and the *hundi* would be properly stamped as payable on demand. See the case of *Chandrakant Mukerji vs. Kartikcharan Chaill.*⁽¹⁾ Apart from these considerations the *hundi* having been drawn at Sháhápúr, which is situated in Súngli, a native State, it is doubtful whether the provisions of the Stamp Act would apply and whether the *hundi* would require any stamp at all. This also meets the objection of first defendant's pleader that the *hundi* being post-dated cannot be sued on. Such a proposition could not however be substantiated if the provisions of the Stamp Act did apply, as section 67 merely prescribes a penalty for defrauding the revenue, and does not in any way invalidate the instrument. The last objection raised by first defendant with which I have to deal is that the *hundi* was not legally transferred to the plaintiff. The *hundi* was sent to plaintiff from Sháhápúr with the letter, Exhibit E., and I am of opinion that this was perfectly good transfer of the *hundi*. The *hundi* is a *namjog hundi*, and cannot, I think, be regarded as a negotiable instrument. Mr. Rele relied on sections 131 and 132 of the Transfer of Property Act, and said there was no valid transfer, as there had been no express notice to first defendant, but section 131 excludes the necessity of notice where the debtor is a party to, or otherwise aware of, the transfer. Here the first defendant became aware of the transfer at latest when served with the summons, and it would operate against him at any rate from that time. See *Lala Jugdeo Sahai vs. Brij Beharilal.*⁽²⁾ There is one other point which perhaps I ought to mention: the *hundi* was drawn on the 8th May at Sháhápúr, and finally presented for payment in Bombay on the 30th of that month. It was at one time contended that this was an unreasonable delay. The point was not pressed, and I am of opinion that there was no delay on the plaintiff's part. As a matter of fact the *hundi* was lost by the second defendant for some days, and so was not sent to plaintiff so soon as it might otherwise have been. There must be a decree against the defendants for Rs. 1,276-4-0 and costs. The first defendant must pay Rs. 68 for the reserved costs of 31st August 1896 and 7th April 1897 and Rs. 90 costs of two days' hearing. Judgment contingent on the opinion of the High Court.

JUDGMENT OF THE HIGH COURT—(Sir C. Farran, C.J.,
and Strachey, J.)

The 1st, 3rd, and 4th questions must be answered in the affirmative, and the 2nd question in the negative.

As to the general question (2) (a) we are of opinion that the Presidency Small Cause Courts Act (XV. of 1882), section 69, renders it incumbent upon the Small Cause Court to draw up a statement of the facts and refer such statement under section 617 of the Code of Civil Procedure, if a question of law arises in a suit, and a party

(1) 5 B. L. R. 103.

(2) I. L. R. 12 Cal. 505.

so requires, even though the trying Judge may not himself entertain reasonable doubt upon the question. We are unable to lay it down as a general absolute rule that a question ceases to be a question of law when there has been a decision of the High Court upon it.

As to the 5th and 6th questions we agree in the view taken by the Chief Judge and answer them accordingly in the affirmative. Costs of reference to be costs in the cause, to be taxed as on the Original Side of the High Court.

ABDUL RAZAK HAJI ABDUL KARIM, PLAINTIFF, VERSUS
JOHN G. KERNAN, DEFENDANT.*

Insolvency—Onerous property of the insolvent vesting in the Official Assignee—Right of Official Assignee to accept or repudiate such property—Taking possession tantamount to acceptance—Indian Insolvency Act (Stat. 11 and 12 Vic. c. 21).

In the Presidency Towns in India in cases of onerous property (e.g. leasehold property) belonging to an insolvent, and as such vesting in the Official Assignee under the Indian Insolvency Act (Stat. 11 and 12 Vic. c. 21), the Official Assignee has the right to elect whether he will accept or repudiate such property.

Except under exceptional circumstances, the taking possession by the Official Assignee of leasehold property is tantamount to an election on his part to accept the lease.

CASE stated for the opinion of the High Court under section 69 of the Presidency Small Cause Courts Act (XV. of 1882) by C. W. Chitty, Chief Judge.

1. This was a suit brought by the plaintiff to recover from the defendant a sum of Rs. 750, being the amount of rent due to him for certain premises situate in Apollo Street, Bombay, from the 1st April to the 30th September 1896, at a monthly rental of Rs. 125, or in the alternative the same sum as compensation for use and occupation of the same premises during the same period.

2. The defendant is the Official Assignee at Madras, and, as such, the assignee of the estate and effects of one A. Sabapathy Mudeliar, an insolvent.

3. The facts of the case on which my decision was based, and the reasons for that decision, are fully set out in my judgment, a copy whereof is hereto annexed and to which for brevity's sake I

* Reported at I. L. R., 22 Bom, 617.

1897.

FULCHAND
GOPALCHAND
BHAYA
VS.
HARI VITHAL
GUIDE.

1898.

Feb. 25.

1893.

ABDUL
RAZAK
HAJI ABDUL
KARIM
vs.
JOHN G.
KERNAN.

crave leave to refer. I gave judgment for the plaintiff for the full amount claimed and costs, but at the request of the defendant's attorney made my judgment contingent on the opinion of the High Court.

4. Before submitting the questions for their Lordships' opinion I should mention a circumstance connected with the facts of the case. The suit was heard before me on the 2nd August 1897. The plaintiff's attorney stated the facts which Mr. P. D. Kanga (who appeared on behalf of Messrs. Craigie, Lynch, and Owen for the defendant) admitted, and to which he said he wished to make no additions. The plaintiff's attorney then addressed the Court at some length and closed his case. Mr. Kanga rose to open the defendant's case, and at the outset remarked that he was exceedingly surprised to hear Mr. Shroff state that the plaintiff did not all along know of the insolvency. I enquired if he admitted that as a fact, and, on his declining to do so, I suggested that evidence should be taken on the point. The plaintiff's manager was then called and examined by Mr. Shroff and cross-examined by Mr. Kanga. He stated that he was ignorant of the insolvency until July or August, when his vakil's man told him of it. Incidentally, in answer to questions as to the new tenancies which were to commence from 1st October 1896, it transpired that a sub-tenant of the insolvent, a Mr. J. A. Grant, had been all along in possession of a room on the upper floor, a portion of the premises originally let to the insolvent. None of the facts deposed to by the plaintiff's manager were challenged in any way by Mr. Kanga, nor did he ask leave to call evidence to contradict them. He continued his address and the case was concluded by Mr. Shroff's reply.

5. I reserved my judgment, which was subsequently delivered on the 16th August in the form annexed, contingent upon the opinion of the High Court. On Monday, 23rd August, Mr. Owen, for the defendant, applied to me to re-open the matter as, he said, there was reason to believe that no such sub-tenancy existed as was alleged by the plaintiff's manager, and that the defendant would like to call evidence on the point. I stated that I thought I had no power to re-open the case, and that, in my opinion, the Full Court also had no power, but that if he pleased he might argue the matter before the Full Court on the next day.

6. On the 24th August Mr. Owen appeared before the Full Court consisting of myself and the learned Second Judge, and repeated his application putting in affidavits of three persons, Sundernath Dinanath Khote, Narayen Dhondoba, and Sarvotam Ganpatrao Kuntak. We adjourned the matter to enable the Second Judge to read the notes of evidence and judgment, and on the 1st September we refused the application on the ground that this Court had no power to interfere with a case which had been referred for the opinion of the High Court. We held that there was no decree or order with which we could deal under sections 37 and 38 of the Act XV. of 1882 as amended by Act I. of 1895.

7. I think that I should also state that even if we had considered ourselves by law empowered to re-open the matter, I should not on the merits have been disposed to do so, and that for various reasons. This was not a case of the discovery of new and important matter or evidence, which might be a ground of review under section 623 of the Code of Civil Procedure in a Court, to which that section applies. Nor could the defendant be said to be taken by surprise. If he were so, his solicitor never expressed it, but allowed the facts deposed to to pass unchallenged. Had he demurred to the statements and asked for an adjournment I should have been disposed to grant it then. What the defendant now desires is permission to controvert statements made for the plaintiff at the hearing, and to adduce evidence to show that such statements were inaccurate. It was suggested that the Official Assignee is in a different position in such a respect from ordinary litigants because much of his information must necessarily be derived from third parties. Without conceding this, it may be mentioned that evidence on the point in question was as accessible to the defendant before and at the trial as it is now. As a matter of fact one of the three persons who has put in an affidavit on his behalf is Narayen Dhondoba, who has, according to his own statement, represented the insolvent in Bombay up to the date of his insolvency. It should also, I think, be pointed out that none of the deponents can state as a fact that the statements of the plaintiff's manager are untrue; they only suggest that they are so. As the Judge who actually heard the evidence, I say that I have no reason whatever for disbelieving the statements of the witness. It will also be observed that even if the statements as

1898.

ABDUL
RAZAK
HAJI ABDUL
KARIM
VS.
JOHN G.
KERNAN.

1898.

ABDUL
RAZAK
HAJI ABDUL
KARIM
vs.
JOHN G.
KERNAN.

to the sub-tenancy were disproved, my finding on the whole case would remain unaltered.

8. I need hardly say that I should be most unwilling to shut out evidence which ought to be given, still more to send up a case for their Lordships' opinion based on an incomplete or incorrect statement of the facts. I do not myself think that any grounds exist in this case for re-opening the matter. I append, however, herewith a copy of the notes taken at the hearing, together with the affidavits which were put in in support of the defendant's application. If their Lordships think, on perusing them, it is necessary or advisable to take further evidence in the case, then it might be remitted to me for that purpose.

9. If their Lordships determine to deal with the case as it stands, then the questions for consideration will be :

(1) Whether in a Presidency Town in India, in cases of onerous property (*e.g.* leasehold property) belonging to an insolvent, and as such vesting in the Official Assignee under the Indian Insolvency Act, the Official Assignee has the right to elect whether he will accept or repudiate such property ?

(2) Whether the taking or remaining in possession of leasehold property by an Official Assignee is tantamount to an election on his part to accept the lease ?

(3) Whether on the facts stated the defendant must not be deemed in law to have been in possession of the premises in question during the six months for which rent is claimed ?

(4) Whether the defendant is not liable to pay to the plaintiff such rent ?

(5) Whether in the alternative the defendant is not liable to compensate the plaintiff for use and occupation of the premises from 9th April to 30th September 1896 ?

10. The defendant has deposited the amount of claim and costs in Court and Rs. 50 to meet the costs of reference.

The following was the judgment of the Chief Judge :

In this case the plaintiff sues to recover from the defendant a sum of Rs. 750, as the amount of rent due to him for certain premises situate in Apollo Street, Bombay, from the 1st April 1896 to the 30th September 1896, at a monthly rental of Rs. 125, or in the alternative the same sum as compensation for use and occupation of the said premises during the same period. The defendant

is the Official Assignee at Madras, and, as such, the assignee of the estate and effects of one A. Sabapathy Moodeliar, an insolvent. The facts of the case are not in dispute. The plaintiff is the landlord of certain property in Apollo Street, which he purchased in January 1895. At the time of the purchase a set of offices in the plaintiff's building was in the occupation of the firm of A. Sabapathy Moodeliar and Co. as monthly tenants at a rent of Rs. 125, with liberty to either party to terminate the tenancy on giving one month's notice. The actual premises included in the lease consisted of one floor and a room on the floor above. Rent was paid regularly by the firm of A. Sabapathy Moodeliar and Co. down to the 31st of March 1896. On that day the firm gave to the plaintiff a notice to determine the tenancy on the 30th April 1896, but such notice was never acted on. Indeed the defendant was apparently unaware of it, until it was produced in Court by the plaintiff's attorney. On the 9th of April 1896 A. Sabapathy Moodeliar (who was, as I understand, the manager of a joint Hindu family carrying on a family business in Bombay, Madras, and elsewhere in that name) was adjudicated an insolvent by the Court for the relief of Insolvent Debtors at Madras, and on the same day the vesting order was made, vesting all his estate and effects in the defendant. On the 11th April Sardarmul Jagonath obtained a decree against the insolvent in the High Court at Bombay, and on the same day the Sheriff in execution of the decree attached the property of the insolvent consisting of office furniture and books lying at the premises in question. The Sheriff kept the property on the premises, which he closed with his own lock. The Sheriff remained in custody from the 11th April until the 20th of August 1896. On the 15th April Mr. Turner, as constituted attorney of the defendant, wrote to the Sheriff asking him to remove the attachment. As this request was not complied with, Mr. Turner on 6th May 1896 took out a Judge's summons in the High Court to have the attachment removed. That summons was made absolute on the 11th August 1896. The proceedings and the judgment are reported at length in I. L. R. 21 Bom. 205. On the 20th August 1896 the Sheriff handed over possession of the attached property to the defendant's agent, Mr. Turner. Mr. Turner gave up possession of the office premises to the plaintiff on the 30th September 1896. It should be here stated that the room on the upper floor was, before the date of the insolvency, and during all the six months for which rent is now claimed, in the occupation of one J. A. Grant, who originally entered as a sub-tenant of the insolvent. The delivery up of possession by Mr. Turner on the 30th September 1896 was by mutual arrangement between him and the plaintiff. Before that date the plaintiff was able to secure new tenants on most favourable terms. He was able to let the office premises to the proprietors of the "Advocate of India" at Rs. 105, and to agree with Mr. Grant for the payment of rent direct to him for the upper room at Rs. 30, an advance on the whole of Rs. 10. It was also arranged that the new tenancies should commence from such date as the defendant should vacate, and they did actually commence from the 1st October 1896. I mention these facts in order to dispose

1898.

ABDUL
BAZAK
HAJI ABDUL
KARIM
vs.
JOHN G.
KERNAN,

1898.

ABDUL
RAZAK
HAJI ABDUL
KARIM
vs.
JOHN G.
KERNAN.

of the argument of the plaintiff's attorney, that if the plaintiff really considered himself entitled to claim rent from the defendant he would also have assuredly claimed an extra month's rent in lieu of notice. It will be patent from the facts stated that such a claim, if made, could not have been substantiated. It would be in effect a claim for damages which the plaintiff admittedly has not suffered. On the 9th June 1896, and again on the 24th July 1896, the plaintiff's attorney wrote to the Sheriff demanding the rent which had on those dates accrued due. On the 17th September 1896 plaintiff for the first time addressed Mr. Turner, and a lengthy correspondence ensued which eventually terminated in the filing of this suit. The correspondence has been put in collectively as Exhibit B, but I think that nothing turns upon it so far as the questions now before me are concerned. The issues raised by the defendant's attorney are, I think, too narrow. The real questions are, (1) whether the defendant is liable for rent claimed or any part thereof, and (2) in the alternative, whether he is liable to the plaintiff in any, and what, sum as compensation for use and occupation. At my suggestion the summons was amended by inserting the alternative claim in order that the real questions at issue might be determined in this suit, and the plaintiff might not be defeated on a technicality. The defendant admits his liability for use and occupation from the 20th August to the 30th September 1896, and has paid to the plaintiff's attorney Rs. 173-6-2 on that account. The amount was accepted by him without prejudice to the plaintiff's right. I will now proceed to consider whether the defendant can be held liable for the rent claimed, that is, as a tenant to his landlord. It is not disputed that the effect of the vesting order of the 9th April was to transfer to the defendant all the estate and effects of the insolvent, including the lease in question. It is also, I think, not in dispute that there was no formal termination of the tenancy in accordance with the conditions on which the insolvent held, that is to say, by a month's notice on either side. The notice to quit of the 31st March was never acted upon, nor was possession given up under it as required by law. It was argued, however, on behalf of the defendant, that he would have in such a case the right of election, an opportunity of refusing or accepting the property which had devolved on him by operation of law under the Act. It is a curious circumstance that during the long period, close upon half a century, that the Indian Insolvent Act has been in force, this important question of the right of the Official Assignee to elect in the case of onerous property should not have formed the subject of a reported decision. No case however was cited before me, nor have I been able to find one. The Act itself is silent upon the point. The only section which alludes to payment of rent is section 22, which provides that no distress shall be made upon the goods of the insolvent for rent due before the vesting order. It was argued for the plaintiff, on the principle that "*Expressio unius est exclusio alterius*," that the Official Assignee would be liable for rent accruing subsequent to the vesting order. So he might be under certain circumstances; but this does not, I think, afford much assistance in determining his right of election. As to

this point I have little doubt, that, on general principles, the right of election to refuse or accept property which is or may be injurious to the estate must be conceded to the Official Assignees in India, although it is not expressly provided for by Statute. "It has long been a recognised principle of the bankrupt law" (says Mr. Robson) "that the assignees of a bankrupt were not bound to take property of an onerous and unprofitable character, to accept in fact a '*damnosa hereditas*,' and a distinction was drawn in this respect between assignees of a bankrupt and the executors of a deceased testator, on the ground that the property of a bankrupt was vested in them by operation of law. The assignees of a bankrupt too were appointed to realise assets for the benefit of the general body of creditors and not for the general discharge of the bankrupt's obligations." This principle was the foundation of a number of decisions in England in the early part of this century. The chief distinction between the law at the time and at the date of the passing of the Indian Insolvency Act was in the mode of transfer of the bankrupt's property. Under the earlier Acts in England a commission of bankrupt was issued, and when an assignee was chosen the commissioners by deed transferred the property to him. It was held that until he had accepted it, such property as a lease remained as it were in suspense and that the liability of the assignee did not therefore commence until he did some act to manifest his assent to the assignment (see *Copeland vs. Stephens*).⁽¹⁾ The vesting clause was not introduced into the English Acts until 1831, but the mere fact that the property vested, as in this case, immediately on adjudication would not, I think, interfere with the application of the general principle. The case of *Levi vs. Ayers*⁽²⁾ is a strong authority in support of this view. There the general principle was extended to the law applying to insolvents in South Australia. I assume, therefore, that in this case the defendant had the option of accepting or repudiating this lease. If, however, this right of an assignee in bankruptcy is clearly established in law, it is no less clearly established that he is bound to exercise his option within a reasonable time, and that while a refusal or neglect to make his election would be deemed an election to reject the lease, still the taking of, or remaining in possession of the property, or the exercise of any act of ownership over it would be held to be an election to take the lease (see *Copeland vs. Stephens*)⁽¹⁾ and *Hanson vs. Stevenson*.⁽³⁾ Now what are the facts here? On the 9th April 1896 these premises with the office furniture vested in the defendant. On the 11th April the furniture was illegally seized by the Sheriff on behalf of an attaching creditor. The subject of the attachment was the furniture, but in levying it the Sheriff wrongly excluded the defendant from the office premises by closing them with his own lock. The defendant was aware of this as early as the 15th April, when Mr. Turner called on the Sheriff to remove the attachment, but he took no steps to have the premises delivered up to him. He allowed them to remain in the Sheriff's occupation until the 20th August.

1898.

ABDUL
BAZAK
HAJI ABDUL
KARIM
vs.
JOHN G.
KERNAN.

(1) 1 Barn. & Ald. 593.

(2) L. R. 3 App. Cas. 842.

(3) 1 Barn. & Ald. 303.

1898.

ABDUL
BAZAK
HAJI ABDUL
KARIM
vs.
JOHN G.
KERNAN.

I am of opinion that the possession of the office premises down to the 20th August must be held to have been that of the defendant, that is to say, as between him and the plaintiff-landlord. A landlord's covenant for quiet enjoyment does not guarantee the tenant against tortious entries, evictions, or interruptions on the part of third persons, because the tenant has his proper remedy against such wrongdoers.⁽¹⁾ It follows that it can be no defence to an action for rent for the tenant to say that he has been illegally dispossessed by a third party. It was said that it has been the custom in Bombay in such cases for the attaching creditors to pay the rent to the landlord. That may or may not be the case. It cannot, I think, affect the rights of the landlord and tenant as between themselves. The truth is that the defendant appears to have been guilty of considerable laches in this matter. He appointed Mr. Turner as his agent to realise Bombay assets, but for no other purpose. He made no enquiries as to the insolvent's rights or liabilities in respect of these premises. When the Sheriff took possession he took no steps to regain it. It would have been easy for him to explain to the Sheriff that rent would be running, and it is hard to suppose that the Sheriff would not in that case have consented to make some provision for the removal of the property attached or for payment of the rent so long as it remained in his hands. For these reasons I think that the defendant must be considered as having been in possession of the office premises before the 20th of August. After that date his possession is admitted. As to the room of the upper floor the case is even stronger, for of this he clearly remained in possession for the whole six months through his sub-tenant, Mr. Grant. It may be that the defendant was unaware of the existence of the sub-tenant, but that I think is due to his want of care in ascertaining the exact position of the insolvent's affairs in Bombay. On the whole matter then I came to the conclusion that the defendant must be taken to have remained in possession of these premises during the whole of the six months for which rent is claimed, that by his conduct he must be said to have elected to take the lease, and that he has thereby become chargeable with the payment of such rent. To avoid possible misapprehension I should state that I regard the defendant's liability as a personal one. This is, I think, clear from the cases above cited, especially *Hanson vs. Stevenson*.⁽²⁾ The case of *Titterton vs. Cooper*⁽³⁾ is also a strong authority for this proposition, although it was decided under the more recent Bankrupt Act of 1869. If I am right in my finding on the point that defendant was in possession of premises throughout, it follows, I think, that defendant must necessarily be liable for use and occupation, even though it might be held that his conduct did not amount to an election to take the lease. With regard to the room on the upper floor the case is covered by authority, for it has been decided that a lessee who has sublet the demised premises may be sued for use and occupation, for he holds the premises as tenant and occupies them by his sub-tenant:

(1) See Woodfall L. & T. p. 713.

(2) 1 Barn. & Ald. 303.

(3) L. R. 9 Q. B. D. 473.

Bull vs. Sibbs⁽¹⁾. The only difference would be that, as the claim for compensation for use and occupation accrues *de die in diem*, the defendant would not be liable in that respect for the first eight days of April, the vesting order having been passed on the 9th. This would mean a reduction in the claim of Rs. 33-5-4. As, however, I am of opinion that the defendant is liable for the rent, there will be a decree in favour of the plaintiff for Rs. 750 and costs and professional costs Rs. 51. My judgment will be contingent on the opinion of the High Court.

JUDGMENT OF THE HIGH COURT (Sir C. Farran, C.J.,
and B. Tyabji, J.)

We agree with the Chief Judge of the Small Cause Court that the first question should be answered in the affirmative. Before us it was not argued that the Official Assignee was bound to take upon himself against his will the liabilities arising out of a leasehold vested in the insolvent at the date of his insolvency. That contention was not, we think, open to the plaintiff after the decision of the Privy Council in *Levi vs. Ayers*,⁽²⁾ which recognises the general law as settled by *Turner vs. Richardson*⁽³⁾ and other cases to be, that "assignees in bankruptcy are not bound to accept a '*damnosa hereditas*,'" and that they consequently have an option to accept or repudiate property which is, or may be, injurious to the estate. The argument for the plaintiff was confined to the contention that the right of the Official Assignee was to disclaim the lease, or rather that he was bound by the lease, unless and until he expressed his intention by words or acts not to take it as part of the assets of the insolvent. In our opinion that contention cannot be supported. The earlier cases upon the question cited to us were *Bourdillon vs. Dalton*,⁽⁴⁾ *Wheeler vs. Bramah*,⁽⁵⁾ *Turner vs. Richardson*,⁽³⁾ and *Copeland vs. Stevens*.⁽⁶⁾ Though loose expressions such as "abandonment" by the assignee are used by the Judge at Nisi Prius, the considered judgments make it, we think, quite clear that a lease was not considered to vest in the assignees unless they accepted it. In the last cited case Lord Ellenborough, delivering the judgment of the Court, at page 604 of the report, says: "We are of opinion that the general assignment of a bankrupt's personal estate does not

1898.

ABDUL
RAZAK
HAJI ABDUL
KARIM
VS.
JOHN G.
KERNAN.

(1) 8 T. R. 327.

(2) L. R. 3 App. Cas. 842.

(3) 7 East, 335.

(4) 1 Esp. 233.

(5) 3 Camp. 341.

(6) 1 Barn. & Ald. 593.

1898.

ABDUL
RAZAK
HAJI ABDUL
KARIM
vs.
JOHNG.
KERNAN.

vest a term of years in the assignees, unless they do some act to manifest their assent to the assignment, as it regards the term and their acceptance of the estate, and upon this ground alone our judgment in the present case is given." The whole judgment places the question beyond doubt. This view of the law was recognised by the Legislature in 5 Geo. IV. c. 98. s. 73, and was always acted upon in England, until the law was altered by the passing of the Bankruptcy Act, 1869. *Ex-parte Dressler*,⁽¹⁾ *Tittlerton vs. Cooper*.⁽²⁾

In our opinion it is now the law in the Presidency Towns in India.

The taking of possession of leasehold property of an insolvent by an Official Assignee has always been regarded as proof of election on his part to take the lease. This has been laid down in the cases: *Turner vs. Richardson*,⁽³⁾ *Copeland vs. Stevens*,⁽⁴⁾ and was re-stated by the Judges in *Ex-parte Dressler*⁽⁵⁾ and *Tittlerton vs. Cooper*.⁽²⁾ In the last case Brett, L.J., says: "It is not easy to enumerate what may be called unequivocal acts, but I may mention the taking possession of the premises demised by the lease," and Cotton, L.J., in the same case says: "It is true that in many of the cases possession of leasehold property is the very strongest proof that a person, to whom a conveyance has been made, has accepted it, and has become assignee of the lease." The Judges in *Ex-parte Dressler*⁽¹⁾ are equally emphatic upon the effect of possession. *Goodwin vs. Noble*⁽⁶⁾ was much relied upon in this and the next branch of the case. The circumstances in that case were very peculiar. The landlord was informed of the purpose for which the assignee wished to remain in possession, and the Court were of opinion that he could not reasonably have inferred from what the defendants did that they meant to take the lease. Our answer to the second question will be that, except under exceptional circumstances, the taking possession by the Official Assignee of leasehold property is tantamount to an election on his part to accept the lease. As to the Official Assignee remaining in possession we do not see how the question arises.

Upon the third question we do not think that the defendant must be deemed in law to have been in possession of the premises during

(1) L. R. 9 Ch. App. 252. (2) L. R. 9 Q. B. D. 473. (3) 7 East, 335.

(4) Barn. & Ald. 593.

(5) 27 L. J. 2 B. 204.

the six months for which rent is claimed. The fourth question, we think, must be answered affirmatively to the effect that the defendant is liable for the rent.

On the 9th April Moodeliar, the lessee of the premises, was declared an insolvent. He had some furniture and books in the leasehold premises. These the Sheriff attached on the 11th of April, entering into possession and putting his lock on the doors. The Official Assignee took steps to remove the attachment, which he succeeded in doing on the 11th August. Down to this time the Official Assignee had done nothing to show an election to take over the lease. On the 20th August the Sheriff made over the attached property to the Official Assignee, who on the same day entered into possession of the premises. He did not inform the plaintiff, the landlord, that he entered with any limited object, or for any special purpose. There is nothing to distinguish the case from the ordinary one of an Official Assignee entering into possession of leasehold premises, and thus consenting to become assignee of the lease. Having made the election, the usual consequence follows. The acceptance of the lease dates back to the vesting order, and the Official Assignee becomes liable for the rent during the period that he continues to be the assignee of the lease, his liability ending when with the landlord's assent he surrendered the term: *Titterton vs. Cooper*⁽¹⁾.

It was contended for the defendant that the notice given on the 31st March 1826 terminated the lease on the 30th April, and that the tenancy came to an end on that day. It has, however, been found as a fact that that notice was not acted on, or, in other words, was waived. It does not appear to us that we have been asked whether what took place really amounted to waiver. We have asked the Chief Judge whether he intended us to consider that question, and he has replied that he stated the notice and its waiver merely as facts in the history of the case. The waiver of the notice, he said, was not contested before him. It is not necessary to answer the other questions. Costs to be costs in the case.

1898.

ABDUL
RAZAK
HAJI ABDUL
KARIM
vs.
JOHN G.
KERNAN.

(1) L. R. 9 Q. B. D. 473.

1898.
Mar. 11.

HIRA NEMA AND OTHERS, PLAINTIFFS, *versus* PESTONJI
DOSSABHAI AND ANOTHER, DEFENDANTS.*

Civil Procedure Code (Act XIV. of 1882) section 257A—Agreement by judgment-debtor to pay a sum in excess of the sum due under the decree—Agreement not sanctioned by the Court.

On 4th December 1889 the plaintiffs obtained a decree against the defendants for Rs. 934-8-0, including costs, payable on the 12th December 1889. The decree carried no interest. On the 9th December 1889 the defendants settled the plaintiffs' claim (which with Rs. 6-8 due to them for some expenses amounted to Rs. 941) by paying Rs. 600 in cash, and passing a promissory note for Rs. 341. The promissory note was payable on demand and carried interest at 3 *per cent. per mensem*. This compromise was not sanctioned by the Court. On the 9th November 1892 the account between the parties was adjusted and the defendants passed a promissory note for Rs. 525, in renewal of the former note, also carrying interest at 3 *per cent. per mensem*. On the 4th November 1892 a similar procedure was adopted and a promissory note for Rs. 815 passed, the rate of interest being the same. In a suit by the plaintiffs on the last mentioned promissory note,

Held, that it fell within the purview of section 257A of the Code of Civil Procedure (Act XIV. of 1882), and, having been made without the sanction of the Court, it was void and unenforceable by reason of the provisions of that section.

CASE stated for the opinion of the High Court under section 69 of the Presidency Small Cause Courts Act (XV. of 1882) by C. W. Chitty, Chief Judge.

1. This was a suit brought by the plaintiffs to recover a sum of Rs. 1,418-1-7, representing the principal moneys and interest due on a promissory note for Rs. 815, dated the 4th November 1895, and executed by both the defendants.

2. The facts of the case, which are not in dispute, together with the reasons for my decision, are fully set out in my judgment, a copy whereof is hereto annexed, and to which for brevity's sake I crave leave to refer.

3. I came to the conclusion, though not without doubt, that the promissory note was governed by the provisions of section 257A of the Code of Civil Procedure. As to the interpretation of the section I considered myself bound by authority, and dismissed the suit, and certified Rs. 51 professional costs of the defendants' counsel, making my judgment contingent on the opinion of the High

* Reported at L. L. R. 22 Bom. 693.

Court. If that decision is wrong, there would be a verdict for the plaintiffs for the full amount claimed and costs and Rs. 51 professional costs.

4. The questions for their Lordships' consideration are :

(1) Whether the promissory note in question falls within the purview of section 257A of the Code of Civil Procedure ?

(2) If it does, whether it is void and unenforceable by reason of the provisions of that section ?

5. The plaintiffs have deposited in Court Rs. 51 for the professional costs and Rs. 50 to meet the costs of reference.

6. I may add that since my judgment was delivered the December number of the Bombay Law Reports has been published, at page 819 of which are some remarks of their Lordships on the section in question, which seem to support the view that the interpretation of its provisions may have to be revised by a Full Bench. See *Krishna vs. Vasudeo*.⁽¹⁾

The judgment delivered by the Chief Judge was as follows :

This is a suit by the plaintiffs to recover from the defendants a sum of Rs. 1,418-1-7, being the principal moneys and interest due on a promissory note for Rs. 815, dated the 4th November 1895, and executed by both the defendants. The facts of the case are not in dispute. In 1889 the present plaintiffs, and one Lukma Sada, now deceased, filed a suit (No. 24103 of 1889) against the present defendants for Rs. 821-6-4. That suit was based on two promissory notes for Rs. 300 each, the balance of the claim being for interest. The defendants were served, but did not appear, and on the 4th December 1889 the plaintiffs in that suit obtained a decree against both the defendants for the full amount and Court costs, and for a further sum of Rs. 51 professional costs against the first defendant. The decree was made payable by the first defendant in eight days, *i.e.* on or before 12th December 1889, and execution was stayed against the second defendant for one month with liberty to him to come in and apply for instalments. On the 9th December 1889, *i.e.* before the decree was capable of execution, it was settled by both defendants by a payment of Rs. 600 in cash, and the passing of a promissory note for Rs. 341, payable on demand, and carrying interest at 3 per cent. *per mensem*. The decree was satisfied and handed over to the defendants, and plaintiffs also made an endorsement on the defendants' summons. That compromise was not sanctioned by the Court. On 9th November 1892, shortly before the promissory note would become barred by limitation, the plaintiffs made up their account with the defendants, and obtained from them a promissory note for Rs. 525 in renewal of the former note for Rs. 341, with

1898.

HIRA NEMA
vs.
PESTONJI
DOSSABHAI.

(1) I. L. R. 21 Bom. 808.

1898.

HIRA NEMA
vs.
PESTONJI
DOSABHAI.

interest at $1\frac{1}{2}$ per cent. per mensem in addition ; that note also bore interest at 3 per cent. per mensem. On 4th November 1895 a similar procedure was adopted and the promissory note in question in this suit was passed for Rs. 815, the rate of interest being the same. The sole question in this suit is, whether the promissory note is not void and unenforceable by reason of the provisions of section 257A of the Code of Civil Procedure. It must first be considered whether the agreement of the 9th December 1889 falls within the purview of that section. If it does, then admittedly the subsequent notes passed in renewal of the note for Rs. 341 are equally void and unenforceable. It should be stated that the Rs. 941 (for which the payment in cash of Rs. 600 was made and the note for Rs. 341 passed) was made up of the amount of the decree and costs, i. e. Rs. 934-8-4 and a sum of Rs. 6-8-0 for buggy hire and stamp expenses, which the plaintiff had incurred and required the defendants to pay, and which the defendants apparently consented to pay. The agreement of the 9th December 1889 does not, in my opinion, fall within the first clause of section 257A. It was not, I think, an agreement to give time for the satisfaction of the judgment-debt. The judgment-debt, which was not then due, was then and there satisfied by the payment of Rs. 600 and the passing of a promissory note payable on demand, and consequently immediately enforceable. I have, however, considerable doubts as to whether the agreement does or does not fall within the purview of the second clause of the section. The promissory note was, as I have said, to carry interest at 3 per cent. per mensem. The defendant says (and he is uncontradicted on that point) that the note was not to be acted upon until the return of the plaintiff Hira Nema, who was at the time absent from Bombay. However that may be, there can be little doubt that it was in the contemplation of the parties that the promissory note might be a continuing security, and that under it the plaintiffs might be able to claim interest at 3 per cent. per mensem. The decree of this Court carried no interest. I incline therefore to the opinion that this was an agreement which provided for the payment, at any rate indirectly, of a sum in excess of the sum due under the decree. That being so, it follows that my decision at all events must be in favour of the defendants. There are, it is true, conflicting decisions as to whether section 257A was ever intended to apply to such an agreement. The Bombay and Allahabad High Courts have held that it does, while the Calcutta High Court has taken the opposite view, and confined the application of the section to proceedings in execution. I am bound by the rulings of our own High Court. As they at present stand they admit of no doubt, though possibly they may have to be reviewed by a Full Bench. The cases are : *Gunesh Shivram vs. Abdulla Beg*⁽¹⁾; *Davlutsing vs. Pandu*⁽²⁾; *Vishnu Vishvanath vs. Hur Patel*⁽³⁾; and *Narayan Deshpande vs. Kashinath Krishna Mutalik Desai*⁽⁴⁾; *Dan Bahadur Singh vs. Anandi Prasad*,⁽⁵⁾ and *Dalu Malvi vs. Palakdari Singh*⁽⁶⁾. The Calcutta cases are : *Jhahar Mahomed vs.*

(1) I. L. R. 8 Bom. 538.

(3) I. L. R. 12 Bom. 499.

(5) I. L. R. 18 All. 435.

(2) I. L. R. 9 Bom. 176.

(4) I. L. R. 15 Bom. 419.

(6) I. L. R. 18 All. 479.

Madan⁽¹⁾ and *Hukum Chund* vs. *Tuharannessa*⁽²⁾. This suit must be dismissed and the defendants' professional costs Rs. 51 certified. My judgment will be contingent on the opinion of the High Court on a case to be stated at the plaintiff's request.

Lang (Advocate General) for plaintiff.

Scott for defendants.

JUDGMENT OF THE COURT (FULL BENCH).

Sir C. FARRAN, C.J.—The first question which we have to consider upon this reference is that suggested by the argument of the Advocate General, viz., whether the promissory note for Rs. 341 payable on demand with interest at 3 *per cent. per mensem*, which the plaintiffs make the basis of their claim, is an agreement for the satisfaction of the judgment-debt due to the plaintiffs within the meaning of section 257A of the Civil Procedure Code. This is not an exact way of stating what is the true question, but it sufficiently explains, I think, the contention of the Advocate General.

On the 9th December 1889 the plaintiffs held a decree against the defendants for Rs. 934-8-0, and Rs. 6-8-0 were payable to them for expenses in connection with the decree, making a total of Rs. 941. The parties met together. The defendants paid Rs. 600 in cash, and for the balance agreed to give the plaintiff their promissory note for Rs. 341, payable with interest. That indisputably was an agreement for the satisfaction of the decree, and if the contention of the defendants in the main point is correct, it was a void agreement. In pursuance of that agreement, *ex hypothesi* void, the defendants gave their promissory note, and the plaintiff thereupon treated the decree as satisfied, handed it over to the defendants, and endorsed the summons to that effect. The consideration for the promissory note was the agreement of the plaintiffs to accept it in satisfaction of the decree. The plaintiffs have performed their part of the agreement, but none the less on that account is the consideration for the note the agreement of the plaintiffs to accept it in satisfaction of the decretal balance, and if that agreement is void, the promissory note given for void consideration is itself void. This is, however, merely a verbal disquisition in answer to a verbal argument. Every adjustment of a decree presupposes an agreement to adjust it, and if

1898.

HIRA NEMA
vs.
PESTONJI
DOSSABHAI.

(1) I. L. R. 11 Cal. 671.

(2) I. L. R. 16 Cal. 504.

1898.

HIRA NEMA
vs.
PESTONJI
DOSABHAI.

the agreement to adjust the decree is void, the adjustment, in so far as it is executory on either side, cannot be enforced. I can see no essential difference between an agreement *for* the satisfaction of a judgment-debt and an agreement *in* satisfaction of the same. In numerous cases decided upon the section, where the arguments ruled to be void were similar to the agreement in the present case, this objection was never suggested. The concluding clause of the section makes the matter, I think, quite clear. In this view it is unnecessary to consider the argument of Mr. Scott, that the agreement was also an agreement to give time for the satisfaction of the judgment-debt. The promissory note was not in fact the agreement, but was given in pursuance of the agreement.

Upon the main question discussed I am of opinion that the previous rulings of this Court upon the effect of section 257A are correct and should be followed. I wish to express my full concurrence in the view forcibly expressed by the learned Chief Justice of Allahabad in the following passage: "Where the Legislature has thought fit to declare an agreement void, unless the Legislature expressly limits the application of its enactment, Courts are bound to give effect to it. There is no such limitation to be found in section 257A." : *Dan Bahadur Singh vs. Anandi Prasad*.⁽¹⁾ After fully considering the reason relied upon in the decisions of the Calcutta and Madras High Courts for limiting the operations of 257A to the Court executing the decree, I have come to the conclusion that it is not entitled to the weight which the learned Judges who took part in these decisions attribute to it. The Legislature, evidently, I think, judging from the section which they framed, considered that the power of executing a decree placed the holder of it in a position to exercise undue pressure over the judgment-debtor and enabled him to obtain terms too favourable to himself from the latter, whose interests needed protection at the hands of the Court which passed the decree. Therefore it was resolved to enact the law now embodied in section 257A of the Civil Procedure Code.

The question would naturally then present itself, In what enactment should such a provision of law find place? Not, I think, in the Code of substantive law relating to contracts. That Code deals generally with void agreements, but a provision that a particular

(1) I, L; R, 18 All, 435, at p. 436.

agreement shall be void, unless approved by a Court, would naturally find its place in an enactment prescribing the procedure of the Court, rather than in an Act dealing with general principles. At all events it is not, I think, out of place in such an enactment. The argument based upon its position in a Procedure Code has therefore, I think, no substantial force. Mr. Scott put the case concisely when he said in determining the meaning of a legislative enactment: "You cannot let the scheme of the Code outweigh the expressed will of the Legislature."

When considering the meaning of the language of section 257A, it is not, I think, out of place to contrast it with the language of the succeeding section: "An adjustment of a decree not certified to the Court shall not be recognised as an adjustment by any Court executing the decree (section 258)." Every agreement for the satisfaction of a judgment-debt" (which provides better terms for the decree-holder than the decree gives him) "shall be void unless it is made with the sanction of the Court which passed such decree" (section 257A). In instituting this contrast I do so with the recollection of the circumstances under which the language of section 258 was varied. It does not, in my opinion, detract from the force of the comparison. It is impossible, I think, to conceive that the Legislature intended to express the same meaning by such totally different language. In short, if the section in question were found in an enactment other than a Procedure Code, it would be impossible I think to contend that it had the limited application ascribed to it by the Calcutta and Madras High Courts. Its position in a Procedure Code, and in a chapter of that Code which is headed of the execution of decrees, does not, in my opinion, alter its meaning. If the language was ambiguous it would be permissible to resort to these aids to interpretation, but not, I think, when the language is plain. The Legislature, for reasons which seemed to it to be good, has declared that such agreements shall be void unless sanctioned by the proper Courts. It is I conceive the duty of the Courts to give effect to that clearly expressed declaration and not to explain it away. I may add that the facts of this case show the undue advantage which grasping decree-holders would be in a position to obtain from their judgment-debtors in the absence of the provision which has been referred for our construction. It would be of little advan-

1898.

HIRA NEMA :
 VS.
 PESTONJ
 DOSSABHAI.

1898.

HIRA NEMA
vs.
PRESTONJI
DOSSABHAI.

tage to the latter to be protected from the Courts executing the decree against them, if their judgment-creditors could obtain the full fruits of their undue pressure by regular suit.

We answer both questions in the affirmative. Costs to be costs in the cause.

CANDY, J.—If the first question is answered in the affirmative, then, in my opinion, the second question must also be answered in the affirmative.

On the second question I have but little to add to the remarks of the learned Chief Justice.

No doubt the arguments used by Mahmud, J., at I. L. R. 7 All. 127 to 134, and by Garth, C.J., and Ghose, J., at I. L. R. 11 Calc. 672, and by Prinsep and Ghose, JJ., at I. L. R. 16 Calc. 507—508, and by Muthuswami Ayyar and Best, JJ., at I. L. R. 17 Mad. 383, deserve the fullest consideration, but I agree with the learned Chief Justice at Allahabad (I. L. R. 18 All. 436) that where the Legislature has thought right to declare an agreement void, unless the Legislature expressly limits the application of its enactment, Courts are bound to give effect to it. There is no such limitation to be found in section 257A. Cases may occur where a merciful judgment-creditor may give time for the satisfaction of a judgment-debt by taking an instalment-bond from his judgment-debtor and seeking no advantage to himself. On the other hand, cases may occur where the judgment-creditor armed with the decree may extort a bond from his judgment-debtor with onerous conditions. The Legislature must be taken to have had regard to these considerations when enacting the plain provisions of section 257A. It was open to the Legislature in 1888 to amend section 257A. just as it amended section 258. It did not do so, and therefore we are bound by the plain words of the law.

As to the first question, it seems to me, on a comparison of the language of sections 257A and 258, that to the argument of the learned Advocate General, that the bond in the present suit is an adjustment of the decree under section 258, there is an obvious answer. Granted; but it also falls within the terms of section 257A, and if so, the agreement is void. Not only are the requisites laid down in section 257A, and the effect of the absence of those requi-

sites different, but the subject-matter is different. Section 258 would seem to apply to a satisfaction *in presenti pro tanto* of a decree. Illustrations of the section may be gathered from numerous reported cases, e.g. payment of money, or delivery of grain, cattle, ornaments, or such like, the decree-holder being satisfied with this compromise in satisfaction *pro tanto* of his decree. All that is necessary for such payment or delivery to be recognised by the Court executing the decree is, that it must be certified. But section 257A would seem to apply to an agreement for the satisfaction *in futuro* of a judgment-debt; the money is admitted to be due and the parties agree as to the manner in which the money is to be paid. That agreement is the foundation of a new contract, but if that agreement gives time for the payment of what is admitted to be due or provides for the payment of more than what is due under the decree, then so far the consideration fails, for such an agreement being void is not capable of being the foundation of any legal right.

This distinction between the subject-matter of the two sections may not have been prominently brought out in some of the reported cases, but that it exists seems clear to me on a careful consideration of the language.

In the present case the promissory note of 9th December 1895 provided for payment of more than what was due under the decree. Therefore it was void. I would answer both questions in the affirmative.

B. TYABJI, J.—I concur.

SHAIK VALIMAMOMED SHAIK ABDULBHAI, PLAINTIFF, versus
ALIBHAI MULA HASANALI, DEFENDANT; KADERBHAI MULA
HASANALI, CLAIMANT.

1898.
HIRA NEMA
vs.
PESTONJI
DOSSABHAI.

1898.
Aug. 26.

Execution—Attachment of property of third person—Payment into Court of amount of decree by such person in order to release property—Investigation of claim—Practice—Civil Procedure Code (Act XIV. of 1882), section 278.

The practice, which has obtained in the Court of Small Causes, in cases where the attachment of moveable property is objected to by a person other than the judgment-debtor, for the bailiff to make an inventory of the property attached, and then, if the objector so wishes, to receive from him the amount of the decree under protest, leave

1898.

SHAIK
VALIMAHOMED
SHAIK
ABDULBHAI
FR.
ALIBHAI
MULA
HASANALI.

ing him to file his claim under section 278 of the Civil Procedure Code (Act XIV. of 1882) in the ordinary course, is permissible if the attaching creditor or his agent does not at the time object to its being resorted to.

If the goods are treated by all the parties as attached, the enquiry into the validity of such attachment can be proceeded with, notwithstanding that the money is paid into Court.

CASE stated for the opinion of the High Court under section 617 of the Code of Civil Procedure (Act XIV. of 1882) by C. W. Chitty, Chief Judge.

1. In the above suit the plaintiff obtained a decree against the defendant for Rs. 821-10-9, including costs, on the 6th June 1898.

2. On the 16th June 1898, in execution of the said decree, the bailiff attached the contents of a hardware shop belonging to the defendant. The claimant, who is the brother of the defendant, claimed the property attached as mortgagee in possession. In order to prevent the property being removed to this Court, or (as would most probably have been the case) the Court's peons being left in charge, the claimant paid to the bailiff under protest the sum of Rs. 830-10-9, that is to say, the amount of the decree plus the costs of execution. He then on the following day, 17th June 1898, filed his claim in this Court, and a notice was issued to the plaintiff under section 278 of the Civil Procedure Code calling on him to support his claim as attaching creditor.

3 The notice came on for hearing before me on the 23rd and 24th June 1898, when on the evidence I found that there was a very large sum, over Rs. 48,000, due by the defendant to his brother the claimant, to secure which the defendant had on the 11th December 1897 executed in the claimant's favour a mortgage or bill of sale of personal property, including the property attached in this suit. By that mortgage it was provided that the claimant should either personally or by his agent remain in charge of the property mortgaged during the continuance of his security. I found it not proved, however, that he had ever taken possession under the mortgage. The defendant had, as a fact, continued the business as before, and it did not appear that any change had been made in the arrangements which had previously obtained as to the conduct and ostensible ownership of the shop.

4. I should therefore in the ordinary course have continued the attachment subject to the mortgage in favour of the claimant. The plaintiff's solicitor, however, raised a further point, that the claimant, having paid the amount of the decree into Court, could not now object to the attachment, but that his only remedy was by substantive suit to recover the amount. In support of his contention the plaintiff's solicitor cited the case of *Varajlal vs. Kachia*.⁽¹⁾

5. I at once admit that if that case is not distinguishable from the present, the plaintiff's objection is good and this claim must be disallowed. I am also bound to say that after reading that case with the greatest care, it is difficult to see the distinction, except that in that case the application of *Kachia* to have the box returned does not appear to have been made under section 278 of the Civil Procedure Code. The point is one of such great importance, and affects so materially the practice of this Court, that I venture to submit it for their Lordships' opinion in the light of the following remarks.

6. It has long been the practice of this Court, in cases where the attachment of moveable property has been objected to by a person other than the judgment-debtor, for the bailiff to make an inventory of the property attached, and then, if the objector wishes, to receive from him the amount of the decree under protest, leaving him to file his claim under section 278 in the ordinary course. The moneys so received are taken by us to represent the goods under attachment, and are retained in Court pending the decision of the case. This course presents many advantages to both the attaching creditor and the claimant. In the case of a *bona-fide* claim it is a very serious hardship for the owner to have his property carried off to Court, or even to have peons with the Court's badge put in charge at his own premises. It frequently necessitates the entire stoppage of his business until such time as he can get his claim heard and decided by the Court. On the other hand, if the claim be a bad one and be disallowed, the attaching creditor gets his money paid over to him at once without the delay and further expense of a sale by

1898.

SHAIK
VALIMABO-
MED SHAIK
ABDULBHAI
VS.
ALIBHAI
MULA
HASANALI.

(1) I. L. R. 22 Bom. 473.

1898.

SHAIK
VALIMAHOMED SHAIK
ABDULBHAI
VS.
ALIBHAI
MULA
BASANALI.

the Court. I have always insisted that the bailiffs shall make a proper inventory of the property attached, and it is with respect to such property and not the moneys deposited that the claim is considered. The trouble and expense of bringing property to this Court or of placing men in charge are avoided, as are also the trouble and expense of a sale through the Court.

7. If the case above cited be carried to its logical conclusion, it would follow that the owner of property wrongfully attached must of necessity submit to the attachment by actual seizure if he is to have recourse to the remedy provided for him by section 278. If, to avoid the loss and possible disgrace which would thereby be caused, he pays into Court the equivalent in money of the property seized he is to be subjected to the trouble and delay of a substantive suit.

8. With these remarks I respectfully submit the following questions for their Lordships' opinion :

(1) Whether the above mentioned practice which has for many years obtained in this Court is bad in law ?

(2) Whether the claim in the present instance must be altogether disallowed ?

9. As the reference is made by the Court *suo motu*, no deposit has been made by either party to meet the costs of reference. I have reserved judgment on the point pending the receipt of their Lordships' answer.

JUDGMENT OF THE HIGH COURT (Sir C. Farran, C.J., and
Badrudin Tyebji, J.).

As to the first question, we see no objection to the practice hitherto followed by the Small Cause Court, if the attaching creditor or his agent does not at the time object to its being resorted to. The provisions of section 269 are for the security of the attaching creditor, and he may waive exact compliance with them if he pleases and the Court allows.

As to the second question, if the goods are treated by all the parties as attached, the enquiry into the validity of such attachment can be proceeded with notwithstanding that the money is

paid into Court. In the case of *Varajlal vs. Kachia*,⁽¹⁾ the goods were released from attachment when the money was paid, so no enquiry could be held as to them under section 278. In fact the goods in that case could not be deemed to be really attached, as once attached the Nazir had no power to release them from attachment.

Costs costs in the case.

1898.

SHAIK
VALIMAHOMED SHAIK
ABDULBHAI
vs.
ALIBHAI
MULA
HASANALI.

SUNDERLAL DEWKINANDAN AND ANOTHER, PLAINTIFFS, versus GURPRASAD MUSADILAL AND ANOTHER, DEFENDANTS; AND GURPRASAD MUSADILAL AND ANOTHER, PLAINTIFFS, versus SUNDERLAL DEWKINANDAN AND ANOTHER, DEFENDANTS.*

1898.

Oct. 10.

Decree—Ex-parte decree—Appearance of party—Appearance by pleader or recognised agent—Appearance for purpose only of applying for adjournment—Dismissal for default—Remedy of plaintiff—Practice—Civil Procedure Code Act (XIV. of 1882), secs. 36, 37, 100, 102, 103—Presidency Small Cause Courts Act (XV. of 1882), sec. 38.

A suit and cross suit between the same parties were on the board for hearing on the 23rd April 1898. On that day counsel for the defendants in the first and plaintiffs in the second suit, accompanied by the *munim* of his clients, appeared in Court and applied for two months' adjournment of both suits. He was unable to state what was the defence, if any, to the claim of the plaintiffs in the first suit. The adjournment was refused, and counsel said that he withdrew from the case. Both suits were then and there disposed of, the claim of the plaintiffs in the first suit being decreed, the second suit dismissed for non-appearance. On the 7th May 1898, an application was made for a re-hearing of both suits. The Court, regarding the decrees as *ex-parte*, granted a rule *nisi* for a new trial, which was made absolute. On an appeal to the Full Court, a reference was made to the High Court.

Held, that under the circumstances the suits must be considered as having been disposed of under sections 100 and 102 of the Civil Procedure Code (Act XIV. of 1882) respectively, and that, whether or not they, or either of them, fell within the category of "contested" suits as defined by section 38 of the Presidency Small Cause Courts Act (XV. of 1882), the remedy under section 103 of the Civil Procedure Code was open to the plaintiffs in the cross suit.

CASE stated for the opinion of the High Court under section 617 of the Code of Civil Procedure (Act XIV. of 1882) by C. W. Chitty, Chief Judge, and Khán Báhádúr Hormusji Dadabhai, Fourth Judge.

(1) I. L. R. 22 Bom. 473.

* Reported at I. L. R. 23 Bom. 414.

1898.

SUNDBERLAL
DEWKEI-
NANDAN
vs.
GURPRASAD
MUSADILAL.

1. The above two suits, which were suit and cross suit between the same parties, were placed on the board of the Fourth Judge for hearing on the 29th October 1897, 15th December 1897, and the 1st February 1898. On each occasion they were adjourned by consent, and on the last occasion the adjournment was granted to the 23rd April 1898.

2. On the 23rd April 1898, Saturday, Mr. Daver was instructed for the defendants in the first and plaintiffs in the second suit. As he was unable to attend, Mr. Dadysett held his brief and appeared on his behalf as authorised by Rule XVII of the Rules of this Court. Mr. Dadysett, who was accompanied by one Bunsidhur Nathuram, the *munim* of his clients, applied for two months' adjournment of both suits. He was unable to state what was the defence, if any, to the claim of the plaintiffs in the first suit. The adjournment was refused, and Mr. Dadysett said that he withdrew from the case. Both suits were then and there disposed of, the claim of the plaintiffs in the first suit being decreed, the second suit being dismissed as for non-appearance.

3. On the 7th May, the said Bunsidhur Nathuram instructed Mr. Brown to apply for a re-hearing of both suits. He made an affidavit in which he described himself as the *munim* of the defendants in the first and the plaintiffs in the second suit. He stated the facts out of which the suits arose. The 6th paragraph of his affidavit as to what happened on the 23rd April contains some mis-statements, but he offered to deposit the amount of the claim in the first suit in Court. The Fourth Judge, regarding the decrees as *ex-parte*, granted a rule *nisi* for a new trial on deposit of the amount. The rule finally came on for hearing on the 18th June last, when it was made absolute.

4. The plaintiffs in the first and defendants in the second suit appealed to the Full Court consisting of myself and the Fourth Judge to have that order set aside on the ground that the Fourth Judge had no power to make it. The matter was argued before us on Tuesday, 5th July 1898, when we reserved judgment.

5. It should be stated that we are agreed that Bunsidhur Nathuram must be regarded as the recognised agent of the defendants in the first and plaintiffs in the second suit. He was

admittedly their *munim*, who was carrying on their business in Bombay, they being resident outside the jurisdiction of this Court. He therefore falls directly within the definition of recognised in section 37 (c) of the Civil Procedure Code. As to how far he was conversant with the facts of the case, (he states them very fully in his affidavit,) or to what extent he was instructed we cannot of course say.

6. The sole question for their Lordships' consideration will be whether under the circumstances above stated the suits must be considered as having been disposed of under sections 100 and 102 of the Civil Procedure Code, respectively, or whether they or either of them fall within the category of contested suits as defined by section 38 of the Presidency Small Cause Courts Act (XV. of 1882) as amended by Act I. of 1895.

7. So far as the Code of Civil Procedure is concerned both suits appear to stand on the same footing. Sections 100 and 102 prescribe the procedure "if the plaintiff appears and the defendant does not appear" and "if the defendant appears and the plaintiff does not appear." By section 36 appearance can be made by the party in person or by his recognised agent or by pleader duly appointed. Chapter VII of the Code draws no distinction between appearances. It does not, that is to say, recognise an appearance for a limited purpose, nor does it make allowances in the case of a person appearing by a pleader partially or imperfectly instructed. In our opinion, therefore, it follows that, if the wording of the sections in chapter VII is to be strictly construed, the defendants in the first and plaintiffs in the second suit must be held to have "appeared" on the 23rd April 1898, as not only was their advocate, but also their *munim*, in Court.

8. There is so far as we are aware no definite ruling of the Bombay High Court on the subject. In Calcutta under the old Code it was held that, where a counsel applied for an adjournment, and on its being refused said he did not appear further, that the decree was *ex-parte*. *Administrator General of Bengal vs. Jálá Dyáráám Dás*.⁽¹⁾ In the recent case of *Rámpertáb Mull vs. Jakeerám Agurwállah*,⁽²⁾ the plaintiff instructed his counsel to move for an adjournment. It was refused, and the case was

1898.

SUNDERLAL
DEWKI-
NANDAN
vs.
GURPRASAD
MUSADILAL

(1) 6 B. L. R. 688.

(2) I. L. R. 23 Calc. 991.

1898.

SUNDERLAL
DEWKI-
NANDAN
vs.
GURPRASAD
MUSADILAL.

dismissed for want of prosecution. The head note is quite misleading, and from the body of the report it is difficult to ascertain whether the plaintiff was or was not actually present in Court. It would rather appear that he was. The learned Judge, however, did not actually decide the question whether or not the case fell within section 102 of the Civil Procedure Code, but dismissed the application on the merits.

9. With regard to the second suit it should be noticed that this suit stands on a somewhat different footing, because of the wording of sections 37 and 38 of the Presidency Small Cause Courts Act abovementioned. The explanation to section 38 defines all cases to be "contested, in which the decree is made otherwise than by consent of or in default of appearance by the defendant." This makes no exception in the case of suits in which the defendant appears and denies the claim and which are dismissed for non-appearance of the plaintiff. If this section be taken literally, it would follow that such suits must be regarded as contested, and that the plaintiff has only eight days in which to come in and set aside the order of dismissal. Such a decision would be somewhat inconsistent with the application to this Court of sections 102 and 103 of the Civil Procedure Code, which would in that case be, to say the least, superfluous, but it appears to us that the wording is clear and admits of no other interpretation.

10. As on full consideration of the matter we entertain doubt as to how it should be decided, and as the point is one of great importance and of the most frequent occurrence in this Court, we submit it for the decision of their Lordships. We have, as required by section 618, stayed the proceedings in both cases pending the return of this reference. The case being stated by the Court *suo motu*, no deposit has been called for from the parties.

The Fourth Judge added this note:—

In making the order of the 18th June 1898, I followed the ruling of the Allahabad and Calcutta High Courts. As, however, I entertain some doubt on the point, I concur in making the reference.

Lang (Advocate General), *amicus curiæ*, for plaintiffs in the first and defendants in the second suit.

Scott, amicus curiæ, for defendants in the first and plaintiffs in the second suit.

The following cases were cited :—*Bhimacharya vs. Fakirappa*⁽¹⁾; *Ramchandra Pandurang vs. Madhav Purshotam*⁽²⁾; *Hildreth vs. Sayaji Piraji*⁽³⁾; *Administrator General of Bengal vs. Lāla Dyrām*⁽⁴⁾; *Jonardan Dobey vs. Ramdhone Singh*⁽⁵⁾; *Hira Dai vs. Hira Lal*⁽⁶⁾; *Rāmtahal Rām vs. Rāmeshar Rām*⁽⁷⁾; *Buldeo Misser vs. Syed Ahmed Hossein*⁽⁸⁾.

1898.
SUNDERLAL
DEWKI-
NANDAN
VS.
GURPRASAD
MUSADILAL.

JUDGMENT OF THE HIGH COURT.

STRACHEY, J.—The principal question raised by this reference is whether the Fourth Judge of the Court of Small Causes was right in holding that the decree against the defendants in the suit had been passed *ex-parte* and that their cross-suit had been dismissed for non-appearance, and whether he was competent to set aside the decree and the dismissal. The suit and the cross-suit were on the board for hearing on the 29th October and 15th December 1897, and the 1st February 1898, and on each of those days were adjourned by consent. The last adjournment was to the 23rd April. What happened on that day is thus stated in the reference :—“ Mr. Daver was instructed for the defendants in the first and plaintiffs in the second suit. As he was unable to attend, Mr. Dadysett held his brief and appeared on his behalf as authorised by Rule XVII of the Rules of this Court. Mr. Dadysett, who was accompanied by one Bunsidhur Nathuram, the *munim* of his clients, applied for two months’ adjournment of both suits. He was unable to state what was the defence, if any, to the claim of the plaintiffs in the first suit. The adjournment was refused, and Mr. Dadysett said that he withdrew from the case. Both suits were then and there disposed of, the claim of the plaintiffs in the first suit being decreed, the second suit being dismissed as for non-appearance.” It is stated in the reference that the *munim* Bunsidhur Nathuram was, within the meaning of section 37 (c) of the Code, a recognised agent of the defend-

(1) 4 B. H. C. R. (A.C.J.) 206.

(2) I. L. R. 16 Bom. 23.

(3) I. L. R. 20 Bom. 380.

(4) 6 B. L. R. 688.

(5) I. L. R. 23 Cal. 738.

(6) I. L. R. 7 All. 538.

(7) I. L. R. 8 All. 140.

(8) 15 Cal. W. R. 143.

1898.

SUNDERLAL
DEWKI-
NANDAN
vs.
GURPRASAD
MUSADILAL.

ants in the suit and plaintiffs in the cross-suit, but that how far he was, on the 23rd April, conversant with the facts of the case, or to what extent he was instructed by his master, the Court is unable to say. All that appears in connection with this point is that, although the *munim* was present when the application for adjournment was made, the counsel applying was unable to state what was the defence, if any, to the first suit. On the 7th May, however, an application was made on behalf of the defendants and upon the *munim's* instructions, for a re-hearing of both suits, and eventually the Fourth Judge, regarding the suit and the cross-suit as having been disposed of under sections 100 and 102 of the Code, respectively, set aside the decree in the suit and the dismissal of the cross-suit. The question raised before the Full Court of Small Causes and referred to us is whether he had power to do so.

In other words, "can a party be said to "appear" at an adjourned hearing when, in his absence, but in the presence of his recognised agent, who is not shown to be conversant with the facts of the case, his counsel, instructed only for the purposes of the application, applies for a further adjournment, and, the adjournment being refused, withdraws and takes no further part in the proceedings? The question depends, first, on section 157 of the Code, which provides that "if on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by chapter VII., or make such other order as it thinks fit." The word "appear" in this section, in reference to the adjourned hearing, must have the same meaning as in sections 100 and 102 and other sections in chapter VII. in reference to the day originally fixed for the hearing. What, then, is meant by the words in section 100, "if the plaintiff appears and the defendant does not appear," and in section 102, "if the defendant appears and the plaintiff does not appear"? Is the mere presence in Court of a recognised agent, or the presence of a pleader instructed only to apply for an adjournment, an appearance by the plaintiff or the defendant? The whole of chapter VII. deals with "the appearance of the parties and consequence of non-appearance." The "appearance" to which all the sections refer is shown by the opening words of sections 96, 97, and 98 to be appearance on the

day fixed "in the summons for the defendant to appear and answer." Section 64, read with Form No. 117 of the fourth schedule, explains the nature of the defendant's appearance in obedience to the summons to appear and answer. He is to "appear" in "person or by a duly authorised pleader of the Court duly instructed and able to answer all material questions relating to the suit, or who shall be accompanied by some other person able to answer all such questions, on a specified date to answer the abovenamed plaintiff." He is further given notice that, in default of his appearance, that is, appearance in either of the ways specified, on the day abovementioned, the suit will be heard and determined in his absence, that is, under chapter VII. Thus the appearance of the defendant mentioned in chapter VII. means appearance either (1) by the defendant in person or (2) by a pleader either himself duly instructed and able to answer all material questions relating to the suit, or accompanied by some other person able to do so. The test of whether the defendant has or has not "appeared" within the meaning of the chapter is whether such of the requirements of the summons as relate to appearance have or have not been complied with. If the defendant has appeared in either of the two ways specified, then he has appeared, and it is immaterial for what purpose he has appeared or what action he has taken on appearance, and in particular that, when appearing, he may not have intended to comply with the other requirements of the summons "to answer the abovenamed plaintiff," to produce his witnesses, or to bring or send his documents. So far as chapter VII. is concerned, the only question is appearance or non-appearance. The appearance of the plaintiff also must mean appearance by either of the two modes specified, for the word "appearance" is clearly used in chapter VII. in the same sense whether the plaintiff or the defendant is spoken of. To these two modes of appearance, a third must be added, that is, appearance by a party's recognised agent under sections 36 and 37. This being what chapter VII. means by "appearance," let us consider what happens on the day fixed for the hearing. If a party wholly fails to appear, that is, if neither he, nor his pleader, nor his recognised agent is present, the procedure prescribed by the chapter is plain enough. The difficulty is where one of them is present, but only for the purpose of applying for an adjournment, and, when the adjournment is refused, withdraws from

1898.

SUNDERLAL
DEWKI-
NANDAN
vs.
GURPRASAD
MUSADILAL.

1893.

SUNDERLAL
DEWKI-
NANDAN
vs.
GURPRASAD
MUSADILAL.

the Court. Now, taking in turn each of the possible modes of appearance just stated, a party who, on the day fixed, attended the Court and personally applied for an adjournment, could not, in my opinion, be said not to have appeared. In such a case the requirements of the summons, so far as regards appearance, have been fully complied with. The party has appeared in person: the purpose for which he appeared, or the action which he took on appearance, is immaterial. Next, take the case in which, the party being absent, an application for adjournment is made on his behalf by a pleader who has no other instructions, and whose functions are at end when the adjournment is refused. In such a case has the party appeared within the meaning of chapter VII.? I think that he has not. Such of the requirements of the summons as relate to appearance have not been complied with. Appearance by a pleader within the meaning of the chapter does not, like appearance by a party in person, mean mere presence in Court; it means appearance "by a pleader duly instructed and able to answer all material questions relating to the suit." In the case supposed, the pleader is not "duly instructed" or instructed at all in the suit: he is instructed only to apply for an adjournment. He is not "able to answer all material questions relating to the suit": he knows nothing about such questions. So far as appearance by a pleader is concerned, chapter VII. read in the light of section 64 and Form No. 117 does, in my opinion, "draw a distinction between appearances," and contemplates appearance only by a pleader duly instructed and able as described. Lastly, take the case in which, the party being absent, his recognised agent is present. If the recognised agent accompanies a pleader who applies on the client's behalf for an adjournment, but who is otherwise instructed, then it is a question of fact whether the recognised agent is able to answer all material questions relating to the suit, in which case section 64 (c) and Form No. 117 seem to show that the party must be deemed to appear by the pleader. In such a case the requirements of the summons as to appearance are as fully satisfied as if the party had appeared in person and applied for an adjournment, and equally in such a case the purpose of the appearance, or the action taken on appearance, seems immaterial. It can hardly be suggested that the words in section 64 (c) and Form No. 117, "some other person able to answer all such questions," could not include a recognised

agent. If, however, the party being absent, neither the pleader applying for adjournment nor any person accompanying him, whether a recognised agent or not, is able to answer all material questions relating to the suit, then, apart from section 36, there is no appearance within section 64, Form No. 117, or chapter VII., and the only remaining question is whether the party appears by his recognised agent under section 36. That is a question of fact. In connection with it, the ability or inability of the recognised agent to answer material questions is, of course, immaterial. But section 36 only says that any appearance required or authorised by law to be made by a party *may* be made by his recognised agent. It does not say that the presence of the recognised agent in Court is necessarily an appearance by the party. The section is purely enabling. Section 37 only defines the recognised agents by whom appearance *may* be made. If the recognised agent personally applied for an adjournment, that would, under section 36, be an application by the party, and such an application would include an appearance, as to which it is unnecessary to decide whether it would or would not constitute an appearance of the party within chapter VII. But if the recognised agent neither made any application nor did any act, the question would be, not merely whether he was present in Court when the application for adjournment was made, but whether he intended to appear, and in fact appeared for the party in the exercise of his power under section 36. If at the time, he stated, either in answer to the Court or otherwise, that he appeared or that he did not appear for his principal, the question of the party's appearance would be definitely determined. If he made no such statement, the question might be difficult to determine, but in the absence of all evidence on the point, his presence at the time of the application should not, I think, be assumed to constitute an appearance by the party. It is likely enough that he might regard the pleader's appearance for the purposes of the application as sufficient, without any additional appearance by himself.

Applying these principles to the present case, the defendants in the suit and plaintiffs in the cross-suit did not on the 23rd April appear in person. They did not appear by their counsel within the meaning of section 157 and chapter VII., because their counsel was neither duly instructed and able to answer all material questions

1898.

SUNDERLAL
DEWKI-
NANDAN
vs.
GURPESAD
MUSADILAL.

1898.

SUNDERLAL
DEWKI-
NANDAN
vs.
GURPRASAD
MUSADILAL.

relating to the suit, nor accompanied by any other person who is shown to have been able to answer such questions. They did not appear by their recognised agent, because the recognised agent, though present, is not shown to have appeared under section 36 on his principal's behalf. The decree in the suit was therefore passed *ex parte* and the cross-suit was dismissed for non-appearance, and the Fourth Judge was competent to make the order setting aside the decree and the dismissal. The view of the case is in accordance with *Bhimacharya Vyankaticharya vs. Fakirappa Anandappa*,⁽¹⁾ *Shanker Dat Dube vs. Radha Krishna*,⁽²⁾ *Hira Dai vs. Hira Lal*,⁽³⁾ *Ramta-hal Ram vs. Rameshar Ram*,⁽⁴⁾ *The Administrator General of Bengal vs. Dayaram Das*,⁽⁵⁾ which was referred to apparently with approval by the Privy Council in *Sahibzada Zainulabdin Khan vs. Sahibzada Ahmed Raza Khan*.⁽⁶⁾

The only other point raised by the reference relates exclusively to the cross-suit. It arises in connection with section 38 of the Presidency Small Cause Courts Act (XV. of 1892) as amended by Act I. of 1895. That section provides that "where a suit has been contested, the Small Cause Court may, on the application of either party, made within eight days from the date of the decree or order in the suit (not being a decree passed under section 522 of the Code of Civil Procedure), order a new trial to be held, or alter, set aside, or reverse the decree or order upon such terms as it thinks reasonable, and may, in the meantime, stay the proceedings." *Explanation*—"Every suit shall be deemed to be contested in which the decree is made otherwise than by consent of or in default of appearance by the defendant." What happened here was that, after the dismissal of the cross-suit, the plaintiffs made an application which is described in the reference as an application "for a re-hearing of both suits." It is not stated that the application purported to be made under section 38, and I infer that the provision of law under which it was made was not mentioned. So far as it related to the cross-suit, it appears to have been treated by the Fourth Judge as made under section 103 of the Code. As the same application related to both the suit and the cross-suit, and, so far as regards the suit, could not

(1) 4 Bom. H. C. Rep. A. C. 206.

(2) I. L. R. 20 All. 195.

(3) I. L. R. 7 All. 533.

(4) I. L. R. 8 All. 140.

(5) 6 B. L. R. 683.

(6) L. R. 5 I. A. at p. 237.

have been made under section 38, it is probable that, as regards the cross-suit, also, it was made not under that section, but under the Code. It was made on the 7th May, beyond the eight days' period mentioned in section 38, but within the thirty days' period prescribed by the Limitation Act for an application by a plaintiff under the Code for an order to set aside a dismissal by default. It is, however, suggested in the reference that, as the cross-suit was "contested" within the definition contained in the explanation, the plaintiffs could only apply to the Court to set aside the dismissal within eight days' period prescribed by section 38, and the question is raised whether section 38 is consistent with the application to the Small Cause Court of section 103 of the Code. In reply to this suggestion, Mr. Scott, who appeared on behalf of the plaintiffs in the cross-suit as *amicus curiæ*, contended that section 38 did not apply to an application to the Court to set aside a dismissal for default. He laid stress on the fact that a "contested" suit as defined in the explanation is a suit in which a "decree" is made, and he argued that a dismissal for default is not a "decree" as defined by section 2 of the Code, but only an order. Without, however, discussing that question, I observe that section 38 expressly includes applications to the Court to set aside "the decree or order in the suit," and as the explanation was clearly intended to be co-extensive with the first paragraph, I think that it must be held to include orders which, at all events, are so far in the nature of decrees that, unless and until set aside, they put an end to the whole suit. But there is another, and, I think, a sufficient answer to the suggestion raised in the reference. Section 37 enacts that "save as otherwise provided by the chapter or by any other enactment for the time being in force, every decree and order of the Small Cause Court in a suit shall be final and conclusive." This saving includes chapter VII. and XIII. of the Code, unless the procedure prescribed by them is inconsistent with that prescribed by any specific provision of the Presidency Small Cause Courts Acts, and also includes section 38 itself. That it includes to this extent chapters VII. and XIII. appears from rule I. read with the schedule of the "Rules of Procedure and Practice of the Court of Small Causes at Bombay" framed by the High Court under section 9 of Act I. of 1895. So far, then, as section 37 is concerned, the right of a plaintiff to apply to the Court under sec-

1898.

SUNDERLAL
DEWKI-
NANDAN
vs.
GURPRASAD
MUSADILAL.

1898.

SUNDERLAL
DEWKI-
NANDAN
vs.
GURPRASAD
MUSADILAL.

tion 103 of the Code to set aside a dismissal for default is expressly saved. The only specific provision of the Presidency Small Cause Courts Act with which it is suggested that such a right must be inconsistent is section 38. I do not think that there is such inconsistency. No doubt, as is pointed out in the reference, a suit which is dismissed for default is a "contested" suit within the explanation to section 38, and the section therefore applies to it. The explanation is in accordance with ordinary language. Whether a suit is contested or not depends exclusively upon the defendant. The plaintiff does not "contest" his own suit, and if he fails to appear, the suit is nevertheless contested if the defendant resists it. The object of the Legislature was to give the right to apply for a new trial in all except undefended cases. But although section 37 includes cases to which section 103 of the Code applies, the two remedies are not inconsistent. As shown in several decisions the jurisdiction under section 38 is revisional. *Sassoon vs. Hurry Dass Bhukut*,⁽¹⁾ *Sadasook Gambir Chund vs. Kanaya*,⁽²⁾ *Shrinivasa Charlu vs. Balaji Rau*.⁽³⁾ Whether in the exercise of its discretion under the section the Court would revise a dismissal for default in the manner contemplated by section 103 of the Code, is a question upon which I need express no opinion. In any event I can see no inconsistency between the two provisions, and no reason why a plaintiff whose suit has been dismissed for default should not have two separate remedies under different enactments. If the plaintiff chooses to apply for a new trial under section 38, he must do so within eight days. If he prefers to apply for an order setting aside the dismissal under section 103 of the Code, he can do so within thirty days. As most plaintiffs would probably do, the plaintiffs in the cross-suit have preferred the latter remedy.

Our answer to the question referred is that in the circumstances stated, the suits must be considered as having been disposed of under sections 100 and 102 of the Civil Procedure Code respectively, and that, whether or not they or either of them fall within the category of contested suits as defined by section 38 of the Presidency Small Cause Courts Act, the remedy under section 103 of the

(1) I. L. R. 24 Calc. 455.

(2) I. L. R. 19 Mad. 96.

(3) I. L. R. 21 Mad. 232.

Code was open to the plaintiffs in the cross-suit. Costs will be costs in the case.

FULTON, J.—I concur with my learned colleague in thinking that sections 37 and 38 of the Presidency Small Cause Courts Act do not affect the applicability of the provisions of section 103 and 108 of the Civil Procedure Code to suits in that Court. Section 37 expressly saves the provisions of other enactments, and thus leaves untouched these sections of the Code which have been applied to the Small Causes Court. Section 38, if it applies to suits dismissed for default (on which point I think it unnecessary to give any opinion), may offer an additional remedy to the plaintiff, but does not deprive him of the rights conferred by section 103 of the Code.

I also concur in holding that the Fourth Judge had jurisdiction to deal with these suits as if the persons who were defendants in the suits and plaintiffs in the cross-suit had not appeared on the day of hearing. On that day their counsel, Mr. Dadysett, appear accompanied by their recognised agent and applied for an adjournment. When this was refused he retired and the suits were proceeded with and disposed of.

The learned Chief Judge points out that chapter VII. of the Code does not recognise a limited appearance. This may be so, but it is so clearly settled by authority that when a counsel or pleader appears merely for the purpose of asking for an adjournment, his application, if refused, does not prevent the suit being treated as disposed of *ex parte*, that it seems to be impossible to re-open the question. Mr. Justice Strachey has collected the authorities on the subject. I need however only refer to *Bhimcharya vs. Fakirappa*⁽¹⁾ as being a decision of this Court given more than 30 years ago. But there still remains the question whether the fact that Mr. Dadysett was accompanied by the recognised agent distinguishes the case from the one just referred to. Whether this man was or was not able to answer all material questions we have no means of knowing. But assuming that he was able, but for some reason did not think proper to conduct the case on behalf of his principal, his mere presence in Court would not, in my opinion, be an appearance in the suit. Section 36 as pointed out by my colleague is permissive. An appearance may be

(1) Bom. H. C. (A.C.J.) 207.

1898.

SUNDERLAL
DEWKI-
NANDAN
vs.
GURPRASAD
MUSADILAL.

1898.

SUNDERLAL
DEWKI-
NANDAN
vs.
GURPRASAD
MUSADILAL.

made by a pleader or recognised agent, but it is evident that the concurrence of the pleader or agent is essential. As soon as he ceases to intend to represent the principal, the latter is unrepresented.

Here Mr. Dadysett, though instructed to ask for an adjournment, was not instructed to appear at the hearing, and the recognised agent, though present in Court, was, it appears, unwilling to carry on the case. In these circumstances it seems to me that there was no appearance at the hearing by the defendants in the suit or by the plaintiffs in the cross-suit.

1898.

Nov. 18.

SARASWATIBAI, PLAINTIFF, versus JANARDHAN SAKHARAM
JOSHI AND ANOTHER, DEFENDANTS.

Limitation—Decree payable by instalments—Oral application by decree-holder for withdrawal of money paid into Court—Step in aid of execution—Limitation Act (XV. of 1877), schedule II, article 179, clause 4.

An oral application by a decree-holder for the withdrawal of money paid into Court by the defendant in execution of a decree payable by instalments is a step in aid of execution of the decree within the meaning of article 179 of schedule II. of the Limitation Act (XV. of 1877).

Bapuchand vs. Mugutrao ⁽¹⁾ followed.

CASE stated for the opinion of the High Court under section 617 of the Code of Civil Procedure by C. W. Chitty, Chief Judge.

1. In this suit the plaintiff on the 27th April 1894 obtained a decreée against both the defendants for the sum of Rs. 1,073-5-0 payable by monthly instalments of Rs. 8, and it was ordered "that in default of payment of one instalment execution do issue for the whole amount which may then be due."

2. The first instalment fell due on the 27th May 1894, on which day the Court was closed on account of the vacation. The Court, however, re-opened on the 6th June 1894, and the first instalment was not paid until the 7th, and was therefore late. The 2nd, 3rd, 4th, and 5th instalments were paid in time. The 6th instalment due on the 27th October 1894 (when the Court was again closed for vacation) was not paid until the 1st November 1894, the Court having re-opened on the 31st October 1894. This

(1) I. L. R., 22 Bom. 340.

instalment therefore was also late. The 7th instalment was paid on the 28th November 1894, and was also late.

3. The defendants continued to pay instalments with more or less regularity up to the 2nd September 1897, by which date they had paid thirty-four instalments or Rs. 272. They then ceased to pay for a time.

4. The plaintiff did not withdraw the instalments as they were paid in, but on the 3rd August 1895 she withdrew Rs. 120, representing the first fifteen instalments, and on five subsequent occasions withdrew other sums which had been paid in by the defendants up to those dates.

5. On the 21st December 1897 the plaintiff applied to me for execution of the decree by the attachment of a moiety of the salary of the second defendant, who was, and, I presume, still is, a clerk in the General Post Office on a salary of Rs. 50 per mensem. On looking into the matter I found that the 1st, 6th, and 7th instalments were, as above stated, paid late, and I held accordingly that the plaintiff's right to execute the decree was barred by limitation.

6. In so holding I followed the decision of their Lordships in suit No. 10317 of 1891—*Jivan Nowroj vs. Jaibai and others*,—in which case I had referred this precise point for their Lordships' opinion. I am unable to give the exact date of the decision, which was communicated to me by letter of the 30th November 1895. The case stated and the order passed upon it will doubtless be found in the records of the High Court, and I would request that reference be made to them.

7. It should be stated that even after the plaintiff's application of the 8th December 1897, the defendants, probably in ignorance of my refusal of such application, continued to pay instalments into Court. Six instalments so paid in were withdrawn by the plaintiff on the 27th July 1898. The defendants have therefore paid in all Rs. 320 towards satisfaction of the decree.

8. On the 27th July 1898 the plaintiff again by her pleader applied to me for execution of the decree, and I was referred to the recent ruling of the High Court in *Bapuchand vs. Mugutrao*⁽¹⁾

1898.

SARASWATI-
BAI
vs.
JANARDHAN
SAKHARAM
JOSHI.

(1) I. L. R. 22 Bom. 340.

1898.

BARASWATI-
BAI
vs.
JANARDHAN
SAKHARAM
JOSHI.

in support of the application. Comparing this case with that above referred to in paragraph 6, I came to the conclusion that they were directly in conflict, and I therefore refer the matter for their Lordships' decision as to which is the correct ruling.

9. It will be noticed that in the case referred from this Court I distinctly stated the fact of the withdrawal of the moneys by the plaintiff, giving the dates, the last of which would have brought the application within the prescribed period of three years. I should perhaps also mention that in this Court no application for withdrawal is made to a Judge, or even to the Registrar. The applicant produces his decree in the Cash Department, and after the payment is duly entered on the decree and checked by the Second Assistant to the Registrar, the applicant receives the money. At the same time he cannot of course procure the payment without an application, which is usually oral, and made in the manner above described.

10. It may be that the fact of the withdrawal of moneys by the plaintiff in suit No. 10317 of 1891, which could only be made on the application of the plaintiff, was overlooked by their Lordships in deciding that case, but I do not consider myself at liberty to assume any such omission on their part. I accordingly submit the following questions for their Lordships' decision :

(1) Whether the withdrawal by the plaintiff on the 3rd August 1895 of Rs. 120 paid in by the defendants up to that date (which withdrawal must be assumed to have taken place in the manner described in paragraph 9), was a step in aid of execution of the decree within the meaning of article 179 of schedule II. of the Limitation Act (XV. of 1877) ?

(2) Whether on the 21st December 1897 the right to execute the decree was barred by limitation ?

11. The plaintiff's application will stand over until the return of this reference, which is made by the Court of its own motion.

JUDGMENT OF THE HIGH COURT (Sir L. Kershaw, C.J.,
and Budrudin Tyebji, J.)

Following the recently reported decision of *Bapuchand vs. Mugutrao*,⁽¹⁾ we reply :

(1) I. L. R. 22 Bom. 340.

(1) That the withdrawal by the plaintiff on the 3rd August 1895 of Rs. 120 paid in by the defendants up to that date (which withdrawal must be assumed to have taken place in the manner described in paragraph 9 of the Chief Judge's reference) was a step in aid of execution of the decree within the meaning of article 179 of schedule II. of the Limitation Act (XV. of 1877).

(2) That on the 21st December 1897 the right to execute the decree was not barred by limitation.

KHIMRAJ ASSU AND OTHERS, PLAINTIFFS, versus KHODABUX
FAKIR MAHOMED AND BABU KHODABUX, DEFENDANTS;
MAHOMED HUSSEIN HAJIBHAI AND KARIMBUX
HAJIBHAI, CLAIMANTS.

1898.
SARASWATI-
BAI
vs,
JANARDHAN
SAKHARAM
JOSHI.

1898.
Nov. 25.

Execution—Attachment of property of insolvent judgment-debtor—Official Assignee has no power to consent to such attachment.

On the 26th July 1897 the plaintiffs obtained a decree against the defendants for the sum of Rs. 787-4-6. On the 7th August 1897 the defendants filed their petition in insolvency, and the usual vesting order was made. The defendants thereafter, without the leave of the Official Assignee, opened a shop and continued to carry on business as grain-dealers. On the 4th July 1898 the Official Assignee, at the instance of the plaintiffs, and in order to have it ascertained, under section 278 of the Civil Procedure Code (Act XV. of 1882), to whom the property in the shop belonged, consented to such, property being attached, but requested the Registrar to detain the amount, if any, realised for payment over to himself.

Held, that such property was not liable to attachment; that the attachment must be raised; and the property made over to the person from whom it was taken.

CASE stated for the opinion of the High Court under section 69 of the Presidency Small Cause Courts Act (XV. of 1882) by C. W. Chitty, Chief Judge.

1. On the 26th July 1897, the plaintiffs in the above suit obtained a decree against the defendants for the sum of Rs. 787-4-6, including costs, payable by instalments of Rs. 50 a month.

2. On the 7th August 1897, the defendants filed their petition in the Court for the Relief of Insolvent Debtors, and all their estate and effects became vested in the Official Assignee. A copy of the vesting order was in the ordinary course forwarded to the Registrar of this Court.

3. I should here mention that it was some time ago arranged between the Official Assignee, Mr. C. A. Turner, and myself, that

1898.

KHIMRAJ
ASSU
vs.
KHODABUX
FAKIR
MAHOMED.

he should in all cases of insolvency communicate the vesting orders to this Court, and that, on his doing so, no attachment should be levied against the property of judgment-debtors who had sought the relief of the Act. This was done in order to save the Official Assignee from the necessity of making a claim or objection under section 278 of the Civil Procedure Code, and it was so arranged on the understanding that the property of a judgment-debtor which had vested in the Official Assignee was not liable to attachment.

4. Under ordinary circumstances, therefore, no execution against property purporting to be that of the judgment-debtors would have been issued in this case. On the 4th July 1898, however, the Acting Official Assignee, Mr. N. C. Macleod, wrote the following letter to the Registrar :

"Re KHODABUX FAKIR MAHOMED AND BABU KHODABUX, INSOLVENTS.

"Sir,

"I have the honour to inform you that the above persons applied for insolvency on the 7th August 1897, and all their estate and effects have become vested in me pursuant to the vesting order made in my favour (copy whereof I am informed has been forwarded to you).

"I now understand from the creditors, Khimraj Assu and Company, that the insolvents have kept a grain shop and have been carrying on business as grain dealers, which they have not handed over to me as Official Assignee.

"Under the circumstances I have the honour to inform you that I have no objection to your issuing an attachment against the said shop &c. of the above insolvents in suit No. 7653 of 1897.

"I have further the honour to inform you not to part with the amount, if any, recovered by virtue of the said attachment without first informing me, as the creditors have undertaken to pay me the same if they succeed in their attempt."

5. It would have been better if the Registrar on receipt of the above letter had applied to me for orders. He did not, however, do so, but caused a writ of *fi. fa.* to issue, under which the property now in question was seized. It consisted of the contents of the shop mentioned in the letter, viz. sundry pictures, benches, boxes, and over 100 bags of grain. The claimants abovenamed objected to the attachment on the ground that the property was their own, and not that of the judgment-debtors, and they filed a claimant notice under section 278 in ordinary course.

6. This notice came on before me for hearing on the 28th July last. The execution-plaintiffs' solicitor, Mr. Brown, raised the issue, whether the property was not that of the judgment-debtors, and I

commenced to take evidence. During the examination of the first claimant I discovered that the judgment-debtors were insolvents and that the above letter had been written by the Official Assignee. I at once raised the question whether, in any event, the attachment could be maintained, as the property was admittedly either that of the claimant, in which case the claim must be allowed, or that of the insolvents, in which case the attachment ought never to have been levied, and must be raised. I was of opinion that the plaintiffs were on the horns of a dilemma, and that in any view of the case they could not succeed. By consent of the parties, however, the evidence for and against the claimants was taken, and the case adjourned to the 11th August for the Official Assignee to attend.

7. On the 11th August the matter was argued again before me, the Official Assignee being present. It was contended on the plaintiffs' behalf that the judgment-debtors had a power of disposing of the goods, but this the Official Assignee did not admit. It was patent that the real intention of the plaintiff and the Official Assignee in the matter had been to obtain in as inexpensive a manner as possible a judicial decision as to the ownership of the property.

8. I delivered judgment on the questions of fact before me. I held that the claimants had failed to prove their ownership, and expressed an opinion that the property was that of the judgment-debtors, and as such vested in the Official Assignee. I should state that the claimants were the sons of the first defendant, that they had assumed the name of their uncle Hajibhai in place of that of their father Khodabux (possibly for the purpose of these proceedings), and that it was apparent that they had been put forward by their father to make this claim. As Mr. Brown for the plaintiffs required a case stated for the opinion of the High Court, I reserved my judgment on the questions of law, and stayed proceedings pending the return of the reference. My opinion, however, was as stated above in paragraph 6.

9. The questions for their Lordships' consideration will be :

(1) Whether the property in question was at all liable to attachment?

(2) Whether the attachment levied was legal?

(3) Whether such attachment must not, in any view of the case, be now raised?

1898.

KHIMRAJ

ASSU

VS.

KHODABUX

FAKIE

MAHOMED.

1898.

KHIMRAJ

ASSU

vs.

KHODABUX

FAKIR

MAHOMED.

(5) To whom should the property attached be made over, to the persons from whom it was taken, or to the Official Assignee?

10. By consent of all the parties, the grain attached was ordered to be sold and the proceeds of the sale retained in Court pending the decision of the case. The plaintiffs have deposited Rs. 50 in Court to meet the costs of reference.

JUDGMENT OF THE HIGH COURT.

The first question should be answered in the negative, and the third in the affirmative. In answer to the fourth question we think that the property should be made over to the person from whom the same was taken.

1898.

Nov. 30.

BHAIJI BHIMJI, PLAINTIFF, versus THE ADMINISTRATOR

GENERAL OF BOMBAY, DEFENDANT.*

Administrator General's Act (II. of 1874), secs. 17 and 18—Order to collect assets—Decree against estate of deceased passed prior to such order—Attachment levied subsequent to such order—Right of Administrator General to have such attachment raised.

On the 18th April 1898 the plaintiff obtained an *ex parte* decree against Kika Devidas as heir and legal representative of Devidas Khushal. On the 29th April 1898 an attachment was levied under section 268 of the Code of Civil Procedure against a sum of money in the hands of Goverdhandas Govindji and due by him to the estate of Devidas Khushal. On the 4th March 1898 an order had been made by the High Court under sections 17 and 18 of the Administrator General's Act (II. of 1874), authorising the Administrator General to collect the assets and ordering him, if necessary, to take out letters of administration to the deceased's estate. On the 2nd July 1898 letters of administration were granted to the Administrator General. On the 15th August 1898 the Administrator General was by consent brought on the record as party defendant in place of Kika Devidas.

Held that, as against the Administrator General, the attachment was void *ab initio*, and that he could claim to have it set aside.

Lalchand vs. Guntibai⁽¹⁾ distinguished.

CASE stated for the opinion of the High Court under section 617 of the Code of Civil Procedure (XIV. of 1882) by C. W. Chitty, Chief Judge.

* Reported at I. L. R. 23 Bom. 428.

(1) 8 Bom. H. C. R. 140 (O. C. J.).

1. This was a suit brought by the plaintiff as creditor of one Devidas Khushal, deceased, against Kika Devidas, heir and legal representative of the said Devidas Khushal, to recover a sum of Rs. 1,145-10-0 and costs. Kika Devidas being a minor was sued by his guardian *ad litem*.

2. On the 18th April an *ex parte* decree was passed against the said Kika Devidas, and on 29th April an attachment was levied under section 268 against a sum of money lying in the hands of Goverdhundas Govindji, and due by him to the estate of the deceased Devidas Khushal.

3. On the 4th March 1898 an order had been made by the High Court under sections 17 and 18 of the Administrator General's Act (II. of 1874) authorising and enjoining the Administrator General to collect the assets, and ordering him, if necessary, to take out letters of administration to the deceased's estate. On the 2nd July 1898 such letters were granted to the Administrator General.

4. On the 15th August 1898 the Administrator General was brought on the record as party defendant and a garnishee notice in respect of the said attachment came on for disposal. As the garnishee had not paid into Court the amount admitted by him to be due to the estate of the deceased, the notice was perforce discharged, but the question arose between the plaintiff and the Administrator General, whether the attachment was not bad, and whether it ought not now in any case to be set aside. That question forms the subject of this reference. I held that the attachment could not now be set aside at the instance of the Administrator General, notwithstanding that the order, under which he took out letters of administration, was made under section 17 of the Act, and that there had also been an order under section 18. The facts of the case and the reasons for my decision are fully set out in my judgment, a copy whereof is hereto annexed, and to which I crave leave to refer.

5. The questions for their Lordships' consideration will be:

- (1) Was the attachment bad *ab initio*?
- (2) If not, did it become bad by reason of the grant of letters of administration to the Administrator General under section 17 of the Administrator General's Act?
- (3) Can the Administrator General now claim to have the attachment set aside?

1898.

BHAJI
BHIMJI
VS.
THE
ADMINISTRATOR GENERAL
OF BOMBAY.

1898.

BHAIJI
BHIMJI
vs.
THEADMINISTRATOR GENERAL
OF BOMBAY.

6. The Administrator General has deposited in Court Rs. 50 to meet the costs of reference.

The judgment of the Chief Judge above referred to was as follows :

The plaintiff was a creditor of Devidas Khushal, who died in the month of November 1896. On the 4th January 1898 the plaintiff filed this suit against Kika Devidas as heir and legal representative of his father, Devidas Khushal, to recover the sum of Rs. 1,145-10-0 and costs. Kika Devidas, being a minor, was sued by his guardian *ad litem* Kuverbái. On the 4th March 1898, on the petition of J. Duxbury & Co., Limited, the High Court made an order under section 18 of the Administrator General's Act (II. of 1874) authorising and enjoining the Administrator General to collect and take possession of the assets of the said deceased ; and by the same order directed him, if necessary, to apply for letters of administration of such assets under section 17 of the said Act. It does not appear that the plaintiff was aware of this order. On the 18th April 1898 this Court passed a decree in the suit *ex parte* against Kika Devidas as heir and legal representative of his father, the said Devidas Khushal. On the 26th April an attachment was levied under section 268 against a sum of money, said to be Rs. 1,000, in the hands of Goverdhundas Govindji, and due by him to the deceased. On the 30th April 1898 the Administrator General issued the usual notice by advertisement for creditors and debtors of the deceased. This notice must have been seen by the plaintiff, as on the 5th May his pleader wrote to the Administrator General to register his name as a creditor. On the 13th June the Administrator General wrote to the plaintiff enquiring if his decree was *ex parte*. To this the plaintiff's pleader replied on the 1st July. On the 2nd July 1898 letters of administration were issued to the Administrator General by the High Court. On the 22nd July the usual garnishee notice was issued against the defendant then on the record, Kika Devidas, and the garnishee. On the 5th August the garnishee appeared before me and wanted time to look into the accounts to ascertain the exact amount due to the deceased. The then defendant was not served, and as the plaintiff's pleader brought it to my notice that letters of administration had been granted to the Administrator General, and that he now represented the estate, I directed a notice to be issued to him to show cause why judgment should not be entered up against him at the suit of the plaintiff on the judgment obtained as aforesaid, and why execution should not issue thereon. On the 15th August Mr. Motilal, for the Administrator General, appeared and consented to his name being brought upon the record as party defendant, and the matter was adjourned for a fresh garnishee notice to be served on the Administrator General in respect of the attachment already levied. That garnishee notice came on for disposal on the 22nd August, when Mr. Desai for the garnishee admitted Rs. 900 due to the estate of the deceased, but required time to pay. He was ordered to pay the amount into Court by Wednesday the 24th August, and the matter was further adjourned to that day for argument. On the 24th August the garnishee was absent, and had also made default in payment of the money. The usual order in that case

would be to discharge the notice and allow the prohibitory order to stand for some time to enable the plaintiff to take such steps as he might be advised. By consent, however, of the parties I heard their arguments on the point raised by the Administrator General, viz., whether the prohibitory order ought not in any case to be discharged as being bad against him *ab initio*, or at any rate from the date of his obtaining letters of administration. The point is one of some difficulty, and the decision is not likely to be of much practical value in the present instance, as it may be impossible to recover anything from the garnishee. At the same time it is a point of some importance and one on which there ought to be a definite ruling. Mr. Carnac appeared to argue the matter, and he stated that had he been present on the 15th August he would not have consented to his name being brought on the record except on the condition that the suit should be treated as having been originally filed against him. Without conceding that he would have had the power to impose any such condition on the Court, I may say that Mr. Motilal, who then appeared for him, never suggested it, and his name was naturally inserted as party defendant, as the person now representing the estate of the deceased. It was contended in the first place that the order of the High Court of the 4th March authorising and enjoining the Administrator General to collect the assets was equivalent to the order of the Insolvent Court vesting an insolvent's property in the Official Assignee, and that after such order no attachment could issue. This contention cannot, I think, prevail. The distinction between the offices of Official Assignee and Administrator General is well drawn by Westropp, C.J., in Gombibai's cases.⁽¹⁾ The wording of the two orders is entirely different. In my opinion the Administrator General, empowered under section 18 to collect assets, is much more in the position of a Receiver appointed under section 503 of the Civil Procedure Code, and the wording of those two sections seems to be in favour of this view. Then it was said that the grant of letters related back to the death of the deceased, and that no attachment could therefore be levied against such assets. In my opinion this contention also fails. It is true that since the decision above referred to the Probate and Administration Act (V. of 1881) has been passed, and section 14 of that Act enacts that letters of administration entitle the administrator to all rights belonging to the intestate as effectually as if the administration had been granted at the moment after his death, but there is no saving here as to the liabilities of the deceased's estate. It is not suggested that a creditor properly and *bond fide* paid in full before the grant of letters of administration to the Administrator General could be compelled to refund any part of the money so paid. If carried to its logical conclusion, this contention would have that effect. It would involve, too, the setting aside of the decree which Mr. Carnac admits that he cannot do. Kika Devidas at the date of suit and down to the issue of letters of administration to the Administrator General represented the estate of the deceased according to Hindu law. He was properly sued in that capacity,

1898.

BHAJI
BHIMJI
vs.
THE
ADMINISTRATOR GENERAL
OF BOMBAY.

(1) 8 Bom. H. C. R. 140.

1898.
 BHAIJI
 BHIMJI
 vs.
 THE
 ADMINISTRATOR GENERAL
 OF BOMBAY.

and the attachment when levied was properly levied, and it cannot now, I think, be set aside, unless there is some provision in the Administrator General's Act to that effect. Section 35 was relied upon by Mr. Carnac. That section is explicit, but it appears to me to be as inapplicable to this case as it was to that decided by Sir M. Westropp. This suit was not brought against the Administrator General, nor did he represent the deceased or his estate at the date of filing the suit, or at the date of the attachment. Besides that section I find nothing in the Administrator General's Act which would justify me in setting aside this attachment. It is true that a judgment-creditor has no priority over another creditor merely by virtue of his decree, but if a judgment or other creditor has legally and properly secured an advantage to himself, I am not aware that there is any authority for saying that he can be deprived of it by the grant of letters of administration to the Administrator General. Under these circumstances my decision must be in favour of the plaintiff. I have not come to this conclusion without some doubt, and I am glad that the matter should go before a higher tribunal. The general policy of the Act seems to be in favour of a rateable distribution among all creditors, but I find nothing in the Act to meet the state of facts which has arisen here. My present order will be that garnishee notice be discharged and the attachment continued until the further order of this Court to enable the plaintiff to take such steps as he may be advised. This order will be contingent on the opinion of the High Court on a case to be stated at the request of the Administrator General.

SUPPLEMENTARY CASE stated for the opinion of the High Court under section 617 of the Code of Civil Procedure (XIV. of 1882) by C. W. Chitty, Chief Judge :

1. In this suit I have already submitted a case on certain questions arising between the plaintiff and the defendant. To that case and the copy of my judgment I would crave leave for brevity's sake to refer.

2. It will be remembered that on the 22nd August 1898 the garnishee appeared by his pleader, Mr. Desai, and admitted that he owed Rs. 900 to the estate of the deceased Devidas Khushal. This he was ordered to pay into Court by the following Wednesday, 24th August, by an order in the following form :

"Upon reading the Judge's summons issued herein, dated the 15th day of August 1898, and on proof of service thereof, and on hearing Mr. Rele, pleader on behalf of the plaintiff, and Mr. Motilal, attorney for defendant, and Mr. Desai, pleader for the garnishee, I do order that the said garnishee do, out of the moneys in his hands, pay into Court the sum of Rs. (900) nine hundred in respect of the decree herein, on or before Wednesday, 24th instant, at 11 A.M. Dated this 22nd day of August 1898."

3. The notice, so far as the questions between the plaintiff and defendant were concerned, was adjourned to Wednesday, 24th August 1898, for argument, and from that day to the 29th August for judgment. On neither of the two latter days did the garnishee appear, and the notice being of no further use as against him was marked as discharged. The order of the 22nd August 1898, however, still stood against the garnishee.

4. As the garnishee did not obey the said order, the plaintiff by his pleader, Mr. Rele, asked me to issue execution against the garnishee under the provisions of section 649 of the Civil Procedure Code. This I agreed, though not without hesitation, to do. An attachment by seizure was accordingly ordered, and the garnishee paid the amount of the debt into Court under protest. He then moved the Full Court to set aside the order for attachment by seizure, alleging that the Court had no power to enforce the order of the 22nd August 1898 in that way.

5. The Second Judge and myself were of opinion that the Court had the power under section 649 to enforce its order, but as the case was already before the High Court on other points, and as this was a most important point of practice, we delivered no formal judgment, but I readily consented to submit this point also for their Lordships' consideration.

6. It may be stated that the form of the order of the 22nd August 1898 has already received judicial sanction in the case of *Toolsa Goolal vs. John Antone*,⁽¹⁾ and Sir Charles Sargent there distinctly laid down that this Court had power to make such an order. If this be so, it must, I submit, follow that such an order is enforceable, and if enforceable, then section 649 appears to be the proper section under which to enforce it.

7. The sole question is whether such an order, as is above set out, is enforceable under section 649, and relatively under chapter XIX. of the Code of Civil Procedure.

Scott for plaintiff; *Lowndes* for defendant.

JUDGMENT OF THE HIGH COURT—(Sir L. Kershaw, C.J.,
and Fulton, J.)

The facts which have given rise to this reference are as follows :

(1) I. L. R. 11 Bom. 448; *ante* p. 147.

1898.

BHAJI
BHIMJI
vs.

THE
ADMINISTRATOR GENERAL
OF BOMBAY.

1898.

BHAIJI
BHIMJI
vs.
THE
ADMINISTRATOR GENERAL
OF BOMBAY.

The plaintiff was a creditor of Devidas Khushal, who died in December 1893.

On 4th January 1898 the plaintiff filed this suit against Devidas's minor son, Kika, as legal representative of his father.

On 4th March the High Court made orders, under sections 17 and 18 of Act II of 1874, directing the Administrator General, if necessary, to apply for letters of administration of the deceased's estate, and authorising and enjoining him to collect and take possession of the assets.

On the 18th April an *ex parte* decree was passed against Kika as legal representative of the deceased.

On the 29th April an attachment was made under section 268, Civil Procedure Code, of a sum of Rs. 1,000, said to be due by one Goverdhundas to the deceased.

On the 30th April the Administrator General issued the usual notice by advertisement for creditors and debtors of the deceased.

On the 5th May the plaintiff wrote to the Administrator General to register his name as a creditor.

On the 2nd July letters of administration were issued to the Administrator General.

Subsequently the Court issued notice to the Administrator General to show cause why judgment should not be entered up against him at the suit of the plaintiff on the judgment obtained as aforesaid and execution should not issue thereon.

On the 15th August Mr. Motilal appeared for the Administrator General and consented to his name being entered as a party defendant.

Afterwards on Goverdhundas admitting that he owed the amount, he was directed to pay into Court the sum of Rs. 900. Thereupon the Administrator General raised the question whether the attachment should not be set aside as being bad against him *ab initio*, or at any rate from the date of his obtaining letters of administration.

Then the learned Chief Judge of the Court of Small Causes referred the following questions :

(1) Was the attachment bad *ab initio* ?

(2) If not, did it become bad by reason of the grant of letters of administration to the Administrator General under section 17 of the Administrator General's Act ?

(3) Can the Administrator General now claim to have the attachment set aside?

To the first of these questions our answer is that against the Administrator General the attachment was bad *ab initio*.

The second therefore becomes superfluous.

To the third question our answer is in the affirmative.

In the case of *Lalchand vs. Guntibai*,⁽¹⁾ it was held, that when a creditor had obtained a decree against the legal representative of a deceased Hindu as such, execution could be levied against the estate, notwithstanding the subsequent grant to the Administrator General of letters of administration. The reason for the decision was that at the time of the decree the widow, against whom the suit was brought, fully represented the estate, and the letters of administration subsequently obtained did not, by relating back to the death of the deceased, override the decree obtained against her. The case occurred in 1871 before the enactment of section 14 of Act V of 1881, which perhaps leaves open to argument the question how far the decision is still binding.

But on this point it is unnecessary for us to express any opinion, for that case is distinguishable from the present, inasmuch as in it prior to decree no order had been passed similar to the one here made under section 18 of the Administrator General's Act. At the time when that decree was passed the Administrator General had no claim whatever to possession of the estate which was wholly vested in the widow. In this case, on the 18th April when the decree was passed against the deceased's son, the Administrator General was entitled by virtue of an order made under section 18 to collect and take possession of the property of the deceased within the local limits of the ordinary civil jurisdiction of the High Court, and if, necessary, to maintain a suit for its recovery. As soon as that order was made, his right to possession became paramount, and excluded that of the deceased's son, who was no longer entitled to receive payment of debts due to his father. From that time forward it was to the Administrator General, and not to the deceased's son, that the debtor was bound to make payment. Therefore a decree subsequently obtained against the son could not, as against the Administrator General, confer any

1898.

BHAIJI
BHIMJI
vs.THE
ADMINISTRATOR GENERAL
OF BOMBAY.

(1) 8 B. H. C. R. (O.C.J.) 140.

1898.
BHAIJI
BHIMJI
vs.
THE
ADMINISTRATOR GENERAL
OF BOMBAY.

rights on the decree-holder, who could not stand on a better position than his judgment-debtor. How far the position of the parties would have been changed if the Administrator General had been made a defendant prior to decree, it is unnecessary to decide, though the case of *Haninabalu vs. Cook*⁽¹⁾ may be referred to on the point. But the entry of his name as a party defendant after decree could not under the Code of Civil Procedure subject him to any liability nor was it contended in argument that such would be the case.

Mr. Scott referred to the cases of *Fowler vs. Roberts*⁽²⁾ and *Burton vs. Roberts*,⁽³⁾ but they merely showed that in England a judgment-creditor, who had obtained a decree and attachment of a debt in a suit against an executor, before the rights of the latter were superseded under an administration decree, could enforce payment from the garnishee. In *Hmanuel v. Bridger*,⁽⁴⁾ which was also cited, it was held that a creditor who had obtained and made absolute a garnishee order before the bankruptcy order had a charge to the extent of the attachment on the bankrupt's estate. But cases of this sort do not touch the point now under consideration. Here the Administrator General's rights had accrued before decree: the defendant at the time when the decree was passed merely represented the deceased's estate subject to those rights, and those rights could not be impaired by a decree to which the Administrator General was not a party.

The learned Chief Judge noted that it was not proved that the plaintiff had notice of the order under section 18. But that does not seem to make any difference. There is nothing in the section to postpone the title of the Administrator General till notice has been given. If it be argued that such a construction involves hardship on the plaintiff, it may be answered that we are not at liberty to alter the wording of the section, and, moreover, that if the plaintiff's decree were to prevail the hardship to other creditors might be still greater. If the estate were insolvent, in which case alone could the question be of any importance, the recognition of priority in the plaintiff's decree would lead to his being paid in full

(1) 6 Mad. H. C. R. 346.

(2) 2 Giff. 226.

(3) 29 L. J. Ex. 484.

(4) L. R. 9 Q. B. 287.

out of moneys in which, in equity, all the creditors were entitled to share rateably. Such a result would be contrary to the intention of the Administrator General's Act and to the principle enunciated by Westropp, J., in *Gamble vs. Bholagir*,⁽¹⁾ in which his Lordship said—"We think it more agreeable to the justice and equity of the case that there should be a distribution of the property of an insolvent amongst his creditors at large than that individual creditors should carry off the whole fund."

In these circumstances it appears clear that under sections 278 and 280 of the Civil Procedure Code, the Administrator General has a right to have the attachment removed, because he was exclusively entitled, at first by reason of the order under section 18 and subsequently by his letters of administration, to recover the debt, and was not subject to any decree which affected his title.

The supplementary question whether the order made to the debtor to pay the money into Court can be enforced under section 649, and relatively under chapter XIX. of the Civil Procedure Code, does not therefore arise. We accordingly abstain from expressing any opinion on it. Costs of this reference to be costs in the case.

1898.
—
BHAIJI
BHIMJI
vs.
THE
ADMINISTRATOR GENERAL
OF BOMBAY.

F. HOGAN, APPELLANT, versus THE MUNICIPAL COMMISSIONER,
RESPONDENT.

1899.
April 4.
—

City of Bombay Municipal Act (III. of 1888), section 2 (g)—"Vehicle"
tax—Bicycle.

A bicycle is a "vehicle" within the meaning of that word in the City of Bombay Municipal Act (III. of 1888), section 2 (g), and liable to be taxed as such.

CASE stated for the decision of the High Court under section 2 (1) of Act XII. of 1888, by C. W. Chitty, Chief Judge.

1. This was an appeal under section 217 of the City of Bombay Municipal Act, 1888, against a tax of Rs. 2 levied by the Municipal Commissioner on the appellant's bicycle for the quarter ending 31st December 1898.

2. There was no question of fact in the case, the only point being whether a bicycle is chargeable with the vehicle tax prescribed by section 180 of the said Act.

(1) 2 B. H. C. R. at p. 164.

1899.
—
HOGAN
VS.
THE
MUNICIPAL
COMMISSIONER.

3. It was argued on behalf of the appellant that the words "and wheeled conveyance of any description capable of being used on the streets of the city" in section 2 (g) must be construed as relating to vehicles "*ejusdem generis*" with those already specified. While agreeing with the appellant's counsel that the Act imposing a tax must be construed strictly in favour of the person to be taxed, I was of opinion that it would be unduly straining the words of this definition to narrow down their scope as he proposed. The case relied on in support of the contention—*Williams vs. Ellis*⁽¹⁾—was in my opinion clearly distinguishable. There the word "other," which generally introduces clauses relating to articles "*ejusdem generis*," appears in each clause, the distinction in the last clause evidently being not between carriages and carriages, but between the different kinds of motive power, "steam or any other powers," &c. It is also noticeable that that case was decided by Lush, J., who was also a party to the decision in *Taylor vs. Goodwin*,⁽²⁾ where a bicycle was held to be a "carriage" "driven" by its rider.

4. A bicycle has been held by the Madras High Court to be a "vehicle with springs"—*Wilson vs. The Madras Municipality*.⁽³⁾

5. Under these circumstances, I was of opinion that bicycle fell within the definition of a vehicle as given in section 2 (g), and that the tax was properly chargeable, and that the appeal must be dismissed. I have some difficulty in certifying that I entertain reasonable doubt in the matter, but as the point is a novel one, so far as our Courts are concerned, and as each party asked me to state a case for the decision of the High Court, should my judgment be against him, I submit the question for their Lordships' consideration.

6. The appeal was dismissed by me, and the respondent's professional costs Rs. 34 certified. That judgment was made contingent on the opinion of the High Court.

JUDGMENT OF THE HIGH COURT.

CANDY, J., gave an oral judgment affirming the decision of the Chief Judge. The following judgment was delivered by

RUSSELL, J.—I am of opinion that the principles to be applied to

(1) L. R. 5 Q. B. D. 175.

(2) L. R. 4 Q. B. D. 228.

(3) L. R. 19 M.L.D. 83.

cases such as the present were correctly stated by Mr. Scott in his argument for the appellant, and to use the expression at 8 Bombay High Court Rep. p. 217, in cases involving the imposition of pecuniary burdens upon the subject, "the bird must be hit in the very eye." Has, in the present case, the bicycle "bird been hit in the very eye?" I am of opinion that it has. "Vehicle" is said by section 2 (g) to "include a carriage, cart, van, dray, truck, hand cart, and wheeled conveyance of any description, capable of being used on the streets of the city." Is a bicycle a wheeled conveyance capable of being used in the streets of the city of Bombay? It certainly is wheeled, or it would not be a bicycle. It is certainly a conveyance, or vehicle, as it carries persons from one place to another. Looking at section 183, I am of opinion that if a person could prove that his bicycle had been under repair for the whole of the quarter he would be exempt from taxation. Whether he would be exempt, if he could prove that he had not used it on the streets for that period, is a question which does not arise. So also if "vehicle" includes "wheeled conveyance," I do not see why the Municipal Commissioners should not compound for the tax under section 185. As to *Williams vs. Ellis*,⁽¹⁾ which was decided in 1880, the sum of 6d. was imposed for every horse or beast drawing any coach &c. or other such carriage; then 5s. was imposed on every carriage, of whatever description, and for whatever purpose, impelled by steam or any other power not being that of horses. Carriages there were held to be *ejusdem generis* with the preceding articles. If instead of carriage the words had been "wheeled conveyance," I apprehend the decision must have been different. Moreover, section 181 exempts a number of things which do not include bicycles. If bicycles were to be exempted, why should they not have been expressed to be so? It is admitted that in 1888, when the Municipal Act was passed, bicycles were known. I apprehend that the draftsman of the Act must be taken to have known of the case of *Williams vs. Ellis*.⁽¹⁾ If we are, as Lush, J., says, to find out the object of the Act, we find this tax in a chapter on Municipal Taxation. I apprehend that the object of a tax on vehicles is to make people who use the roads with them pay for the up-keep of the roads. Section 139 deals with "vehicles." If a bicycle is a vehicle as, I think it is, it must be taxed as such.

1899-
HOGAN
vs.
THE
MUNICIPAL
COMMISSIONER.

(1) L. R., 5 B. D. 175.



INDEX.

A.

PAGE

Abkari Act (Bom. Act V. of 1878, sec. 55)—Construction—

Order of confiscation—In a sentence beginning with a negative,
'or' equivalent to 'nor.' *Framji M. Punjabi vs. The Secretary
of State* 345

Acknowledgment—not admissible unless duly stamped . . . 482

Acts—

(Stat.) 11 & 12 Vic., ch. 21	539
(Stat.) 11 & 12 Vic., ch. 21, sec. 23	66
Act IX. of 1850, secs. 25 and 32	12
Act IX. of 1850, sec. 34	71
Act IX. of 1850, secs. 91, 25	60
Act IX. of 1850, secs. 91, 98, 25	85
Act XVIII. of 1854, secs. 11, 43	73
Act XVIII. of 1854, sec. 17	45
Act XIII. of 1855	297
Act IX. of 1856, sec. 3	21
Act XV. of 1856, sec. 5	135
Act I. of 1859, sec. 46	2
Act VIII. of 1859, sec. 296	56
Act XXVI. of 1864, sec. 2	12
Act XXVI. of 1864, sec. 25	60
Act IX. of 1871, schd. 2, arts. 8, 115	55
Act IX. of 1871, schd. 2, art. 72	58
Act IX. of 1871, schd. 2, art. 85	56
Act XXV. of 1871, sec. 2	45
Act I. of 1872, sec. 92, prov. 1	193
Act I. of 1872, sec. 92, prov. 5	320
Act IX. of 1872, secs. 39, 54, 55	470
Act IX. of 1872, sec. 45	336
Act IX. of 1872, sec. 51	401
Act IX. of 1872, sec. 93	246
Act IX. of 1872, sec. 103	235
Act IX. of 1872, sec. 108	123
Act II. of 1874, secs. 174, 18	580
Act IX. of 1875, sec. 3	514

Acts—continued.

	PAGE
Act I. of 1877, sec. 23 cl. (h), sec. 27 cl. (e)	210
Act IV. of 1877, secs. 87, 121, 122	106
Act XV. of 1877, sec. 19	482
Act XV. of 1877, sec. 22	527
Act XV. of 1877, schd. 2, art. 179, cl. 4	574
Act I. of 1879, sec. 34, schd. 1, art. 1	482
Act XVII. of 1879, sec. 3, cl. (w)	142
Act XXVI. of 1881, secs. 6, 8, 17, 30, 32, 78, 85, 92	252
Act XXVI. of 1881, secs. 70, 71	525
Act VI. of 1882, sec. 45	210
Act IX. of 1882, sec. 55	460
Act XIV. of 1882, secs. 36, 37, 100, 102, 103	561
Act XIV. of 1882, sec. 257A.	290, 550
Act XIV. of 1882, secs. 267, 268, 503	147
Act XIV. of 1882, sec. 268	406
Act XIV. of 1882, sec. 278	557
Act XIV. of 1882, sec. 280	519
Act XIV. of 1882, sec. 284	404
Act XIV. of 1882, sec. 303	420
Act XIV. of 1882, sec. 503	277
Act XIV. of 1882, sec. 506	386
Act XIV. of 1882, secs. 520, 521, 525, 526	472
Act XV. of 1882, sec. 18	187, 375
Act XV. of 1882, sec. 19 (l)	505
Act XV. of 1882, sec. 38	561
Act XV. of 1882, sec. 57	169
Act XV. of 1882, sec. 69	261, 290, 508 & 533
Act VII. of 1889, sec. 4	277
Act VIII. of 1890, sec. 52	514
Act IX. of 1890, sec. 75	422
Bombay Act VI. of 1863	110
Do. Act III. of 1865	193
Do. Act V. of 1878, sec. 55	345
Do. Act III. of 1888, sec. 2 (g)	589
Do. Act III. of 1888, secs. 142, 156, 157, 248	351
Do. Act III. of 1888, secs. 142 (2), sec. 158 (2)	281
Do. Act III. of 1888, secs. 142, 158, 248	362
Do. Act III. of 1888, secs. 142, 248	382
Do. Act III. of 1888, sec. 158	363
Do. Act III. of 1888, secs. 301, 527	430

Administrator General—Administrator General's Act (II. of 1874), secs. 17 and 18—Order to collect assets—Decree against

estate of deceased passed prior to such order—Attachment levied subsequent to such order—Right of Administrator General to have such attachment raised. <i>Bhaiji Bhimji vs. Administrator General</i>	590
Agreement by judgment-debtor to pay a sum in excess of the sum due under the decree—Agreement not sanctioned by the Court void and unenforceable under sec. 257A. of the Civil Procedure Code. <i>Hira Nema vs. Pestonji Dossabhai</i>	550
Agreement for permission to quarry —Licence necessary—Non-renewal of licence—Construction of agreement—Conditional or unconditional promise to pay. <i>Gokaldas Madhowji vs. Narsu Yenkuji</i>	227
Agreement to give time for satisfaction of judgment-debt—Void if not sanctioned by the Court, <i>i.e.</i> not enforceable	290
Alteration, material —Promissory Note. <i>See</i> PROMISSORY NOTE	102
Appearance by pleader or recognised agent only for purpose of applying for adjournment	561
Application, (oral) by decree-holder for withdrawal of money	574
Arbitration —Application to file award—Objections to the <i>fictum</i> and validity of the submission and the award—Civil Procedure Code, secs. 520, 521, 525, and 526. <i>Tejpar Devchand vs. Mahomed Jamal</i>	472
Arbitration —Appointment of umpire by arbitrators—Mode of appointment prescribed by contract—Delegation by arbitrators of their right to appoint umpire. <i>J. G. Smith vs. Ladha Ghela Dimodhar</i>	320
Arbitration —Consent of parties to a reference—Pleadings to be authorised in writing—Application to be in writing—Revocation of order—Practice—Civil Procedure Code (Act XIV. of 1882), sec. 596. <i>Dayal Mowji vs. Nanbai</i>	386
Assignment of Contract —Suit by assignee of contract for damages for non-delivery—Plea that assignment was a sham assignment—Fraud—Right of third party to question <i>bona fides</i> of assignment—Demand for delivery—Contract Act (IX. of 1872), sec. 93. <i>Mulji Govindji vs. Nathubhai Hirachand</i>	246
Assignment of debt —Consent of debtor—Validity—Attachment—Payment into Court of moneys not actually attached—Discharge—Civil Procedure Code (XIV. of 1882), sec. 268. <i>Kara Vusonji vs. Karasji Edalji</i>	406

	PAGE
Assignment of debt by word of mouth—Validity. <i>Ladkibai vs. Vasanji Heerji</i>	36
Assignment of Contract—Tender by third party	286
Attachment of debt of any amount. <i>See</i> EXECUTION OF DECREE	404
Attachment—Power of Small Cause Court to attach and sell the right, title, and interest of a judgment-debtor to and in shares in a public company standing in his name and that of a third party—Mode of dealing with such property when sold—Civil Procedure Code Act (XIV. of 1882), sec. 303. <i>Jaising Hathising vs. Bholanath Revashankar</i>	420
Attachment levied, on assets of deceased subsequent to order to Administrator General to collect assets	580
Attachment of property, of Insolvent judgment-debtor	577
Attachment of property, of third person	557
Attorney and Client—Bill of costs—Limitation—Act (IX. of 1871), sch. 2, art. 85—Act VIII. of 1859, sec. 206. <i>Hearn vs. Bapu Saju</i>	56

B.

Bailor and Bailee—Proprietor and Driver of public conveyance. <i>See</i> MASTER AND SERVANT	110
Bicycle—"Vehicle" Tax	589
Bill of Exchange—Drawer and Drawee the same bank—Forged endorsement of payee—Payment by drawee on forged endorsement—Liability of drawer—Ambiguous instrument—Election to treat it as a bill of exchange—Negotiable Instruments Act, secs. 6, 8, 17, 30, 32, 78, 85, 92—Review by High Court—Reversal of previous decision. <i>Sulleman Hussein vs. The New Oriental Bank Corporation Ltd.</i>	252
Bill of Exchange—Negotiable Instruments Act, secs. 70, 71, and 75. <i>See</i> HUNDI	525
Bill of Lading—Charter-party—Incorporation in bill of lading of terms of charter-party—Freight payable on intake measurement of cargo—Measurement at port of delivery—Discrepancy in measurements—Evidence—Burden of proof—Suit by consignee for excess freight. <i>Cursetji Rustomji Setna vs. T. Williams</i>	95
Bill of Lading—Construction of exceptions—Leakage—Breakage—Damage to goods by leakage from other goods. <i>John Graham vs. Hill</i>	30

Bill of Lading —Construction—Delivery in Dock—"Landing or craning charges"—Practice of Dock to recover from consignee—Liability of ship-owner. <i>James Scott vs. James Finlay</i>	114
Bill of Lading —Exemption clause in—Stowage—Negligence of the crew or other servants of the ship—Period of loading covered by the contract of carriage—Fitness or unfitness of ship. <i>Hassambhai Visram vs. The British India Steam Navigation Company</i>	17
Bill of Lading —"Weight, contents, and numbers unknown"—Negligence of Master. <i>Frank Cutler vs. Captain Dreyer</i>	13
Bill of Lading —"Weight, contents, and value unknown"—Action against Master—Assignee of bill of lading for value—Construction—Act IX. of 1856, sec. 3. <i>W. Nicol & Co. vs. J. S. Castle</i>	21
Board supplied —Limitation—Act IX. of 1871, sch. 2, art. 115.	55

C.

Carriers. See RAILWAY, SHIPPING, BILL OF LADING.	
Carrying on business —Jurisdiction—non-resident foreigner	375
Caste —Bond for repayment of caste moneys passed to plaintiffs—Right of plaintiffs to sue on the bond—Stipulation for payment "when the caste shall demand"—Condition precedent—Demand may be by suit—Demand by majority sufficient. <i>Narsu Konari vs. Linguji Mankuji</i>	427
Cause of action —Splitting—Tradesman's account—Act IX. of 1850, sec. 34—Jurisdiction. <i>Kassam Juma vs. Khima Dolla</i>	71
Charter-party —Incorporation of terms of charter-party in bill of lading—Freight payable on intake measurement of cargo	95
Civil Procedure Code (Act XIV. of 1882), secs. 36, 37, 100, 102, and 103	561
Civil Procedure Code (Act XIV. of 1882), sec. 257A—Agreement to give time for the satisfaction of a judgment-debt—Agreement void if not sanctioned by the Court—Void, i.e. not enforceable—Agreement not illegal. <i>Bank of Bengal vs. Vyabhai Gangji</i>	209
Civil Procedure Code (Act XIV. of 1882), sec. 257A—Agreement by judgment-debtor to pay a sum in excess of the sum due under the decree—Agreement not sanctioned by the Court. <i>Hira Nema vs. Pestonji Dossabhai</i>	550
Civil Procedure Code (Act XIV. of 1882), ss. 267, 268, & 503.	147

	PAGE
Civil Procedure Code (Act XIV. of 1882), sec. 278	557
Civil Procedure Code , sec. 280—Claim to goods consigned for sale on commission—Railway receipts	519
Civil Procedure Code (Act XIV. of 1832), sec. 506. <i>See</i> ARBITRATION	386
Claim , Investigation of	557
Commission Agents , liability in placing Indent orders. <i>See</i> PRINCIPAL AND AGENT	216
Compromise of a <i>bona fide</i> claim, a good consideration for a contract	367
Contract , absolute—Demurrage—Liability of one purchaser for delay of others	199
Contract Act , sec. 45—Right of surviving partners to sue in the name of the firm without joining representatives of a deceased partner. <i>See</i> PARTNERSHIP	336
Contract Act , sec. 90, illustration (c), 95, 98, 108	123
Contract Act , sec. 103—Railway receipts not documents of title.	235
Contract —Action on settled contracts maintainable without express agreement of settlement. <i>Ramsahimul Hukmchand vs. Kesubdev Mulchand</i>	418
Contract —Fraudulent or sham assignment—Right of assignee to sue. <i>See</i> ASSIGNMENT	246
Contract —Acceptance—Unauthorized act of agent—Right of appeal to committee—Waiver—Notice—Rules 17 and 21 of Bombay Cotton Trade Association. <i>Damji Meghji vs. A. Harvey</i>	131
Contract —Rules of the Bombay Cotton Exchange, Rule 25—Indian Contract Act (IX. of 1872), sec. 51—Plaintiff not ready and willing to perform cannot sue for damages. <i>Meghji Anandji vs. Narumal Talakchand</i>	401
Contract —Breach—Damages when goods of the contract description are not available—Principles to be borne in mind in assessing damages. <i>Ralli Brothers vs. Goculbhai Mulchand.</i>	261
Contract —Agreement between a Hindu husband and his wife for her maintenance—Want of consideration	389
Contract —Construction—Custom or usage qualifying contract—Evidence Act (I. of 1872), sec. 92, prov. 5—"Shipment," meaning of—Arbitration—Appointment of umpire by arbitrators—Mode of appointment prescribed by contract—Delegation by arbitrators of their right to appoint "umpire." <i>J. G. Smith vs. Ludha Ghella Damodar</i>	320
Contract for forward delivery—Delivery tendered by third party	

	PAGE
on behalf of one of the contracting parties—Refusal to accept—Assignment of contract. <i>Sivji Karamsi vs. C. A. Beyts</i>	286
Contract , illegal and against public policy—Bond given by an insolvent after personal discharge in respect of a scheduled debt. <i>See</i> INSOLVENT	436
Contract —Indent of goods to arrive—Agreement to retire drafts drawn against such goods—Prepayment—Goods not according to sample—Right of indenter to refuse and raise the defence that goods were not according to sample. <i>M. A. Patheria vs. Mohundas Kamalsi</i>	437
Contract —Liability of Hindu married woman, living apart from her husband and earning her own livelihood— <i>Vithoba Laxumon vs. Gangaboi</i>	40
Contract , performance excused by unforeseen occurrence	216
Contract —Railway receipt—Conditions—Port Trust charges—Charges in force on Shipping Lines—Liability of consignee. <i>Jethabhai Sivji vs. J. A. Shepherd</i>	393
Contract —Forward delivery—“Contract not to be cancelled”—Rules of the Bombay Cotton Trade Association—Rule XVII.—Claim for damages by seller who is not ready and willing to deliver on the due date. <i>Vanmali Hargovind vs. Tarachand Ganeshamdas</i>	305
Contract —Sale of goods for forward delivery—Agreement by buyer to pay earnest money—Condition precedent—Indian Contract Act (IX. of 1872), secs. 39, 54, 55. <i>Haji Suleman Haji Sumar vs. Narondas Hari</i>	470
Contract —Breach—Variance between two parts of a written contract—Failure of part—Performance of contract—Damages. <i>Kuverji Nanji vs. Umersi Hari</i>	314
Contract —Agreement for sale of house—Title—“Fazendari ground.” <i>Anandji Kurpal vs. Shridhar Balkrishna</i>	5
Contract of sale —Goods lying at French port to be delivered there—French measurement adopted. <i>Nanabhai Oursetji vs. Haji Hussain Mitha</i>	39
Contract —Consideration—Compromise of a <i>bona fide</i> claim a good consideration—Agreement to lend money on mortgage—Delay in completion of agreement—Subsequent agreement to pay interest from a certain date—Consideration for such agreement—Right to rescind—Time of essence of contract—Suit by lender against borrower. <i>Dadabhai Dajibhai Baria vs. Pestonji M. Bharucha</i>	367

	PAGE
Contract , wagering contract. See EVIDENCE	193.
Conversion , of <i>hundi</i> . See HUNDI	409
"Costs in the Case" —Civil Procedure Code (Act XIV. of 1882), sec. 620—To be dealt with by the Judge of the Small Cause Court. <i>Hassambhai Visram vs. British India S. N. Co.</i>	187
Covenant in a deed of sale of leasehold property. See LEASE-HOLD PROPERTY	151

D.

Damages —Death by negligence. See NEGLIGENCE	297
Damages —Case of simultaneous payment and delivery. See CONTRACT	401
Damages , differences on "Settlement contracts." See CONTRACT.	418
Damages , "contract not to be cancelled"—Seller not ready and willing to deliver. See CONTRACT	305
Damdapat, Law of —Interest—Penalty	11
Debt , assignment of	406
Dekkhan Agriculturists' Relief Acts, 1879 to 1882 —Act XVII. of 1879, sec. 3 cl. (v) — Subject-matter of suit — Definition of an "agriculturist." <i>Balaji Vishvanath vs. Vishvanath Vithoba</i>	142
Declaratory decree. See JURISDICTION	186
Decree, Ex parte decree —Appearance by pleader or recognized agent—Appearance for purpose only of applying for adjournment—Dismissal for default—Remedy of plaintiff—Practice—Civil Procedure Code (Act XIV. of 1882), secs. 36, 37, 100, 102, 108—Presidency Small Cause Courts Act (XV. of 1882), sec. 33. <i>Sunderlal Dewkinandan vs. Gurprasad Musadilal</i> .	561
Decree against the estate of deceased —Order to Administrator General to collect assets	580
Delivery order —Effect of endorsement of—Vendor's lien—Indian Contract Act (IX. of 1872), secs. 90, 95, 98, 108. <i>LeGeyt vs. Harvey</i>	123
Demurrage —Sale of cargo by consignee—Several purchasers—Contract incorporating the charter-party—Liability of one purchaser for delay of all—Contract absolute. <i>Volkart Brothers vs. Nusserwanji Jehangir</i>	199
Deposit by one joint-debtor of policy belonging to him to secure the joint-debt—Liability of other joint-debtor for <i>premia</i> paid by the plaintiffs to keep the policy alive. <i>Manekji Merwanji vs. Khansaheb Furdunji and Spiers</i>	441

	PAGE
Deviation , valued policy. <i>See</i> INSURANCE	505
Dismissal of suit for default —Remedy of plaintiff	561
Distress Warrant —Property belonging to the person from whom rent is claimed—Liability of property pledged to attachment—Act XV. of 1882, sec. 57. <i>Abdul Rahiman Abdul Kalur vs. Haji Umar Sumar</i>	162
Donatio mortis causa ; Incomplete gift. <i>See</i> JURISDICTION	187

E.

Earnest-money , payable under a contract for sale of goods for forward delivery.—Condition precedent. <i>See</i> CONTRACT	470
Evidence —Evidence Act (I. of 1872), sec. 92, prov. 1—Contract—Wagering contract—Bombay Act III. of 1865—Oral evidence admissible to prove a contract in writing to be a gaming transaction. <i>Anupchand Hemchand vs. Champsi Ugerchand</i>	193
Evidence —Evidence Act (I. of 1872), sec. 92, prov. 5—Evidence of custom or usage not admissible to explain or vary the natural and ordinary meaning of the words of a contract	320
Evidence admissible to contradict a recital in a bond	486
Evidence —Railway Company—Act XVIII. of 1854, secs. 11, 43—Burden of proof	73
Evidence —Recitals in deed not sufficient proof in themselves of facts recited. <i>Govindji Mohanji vs. Maneckchand Nagsi</i>	352
Execution —Attachment of property of Insolvent judgment-debtor—Official Assignee has no power to consent to such attachment. <i>Khimraj Assu vs. Khodabux Fakir Mahomed</i>	577
Execution —Attachment of property of third person—Payment into Court of amount of decree by such person to release property—Investigation of claim—Practice. <i>Shaik Vali Mahomed Shaik Abdulbhai vs. Alibhai Mula Hussanali</i>	557
Execution —Practice—Power of Small Cause Court to attach and sell a debt of any amount—Civil Procedure Code (XIV. of 1882), sec. 284. <i>R. Gilbert vs. Shaik Nur Oussam</i>	404
Execution —Practice—Garnishee—Attachment by judgment-creditor of a debt due to judgment-debtor by a third party—Order upon the third party to pay when debt is admitted—Procedure where existence of debt not admitted. Civil Procedure Code (XIV. of 1882), secs. 257, 268 503. <i>Tulsa Gulal vs. John Antone</i>	147
Ex parte Decree	561

F.

	PAGE
Fraudulent assignment of contract —Demand for delivery by assignee	246
Freight —payable on "In-take measurement"—Evidence—Burden of proof. <i>See BILL OF LADING</i>	95

G.

Garnishee Notice —Practice—Procedure. <i>See Execution</i>	147
Guardian and Wards Act —VIII. of 1890, sec. 52. <i>See MINORITY</i>	514

H.

High Court —Power to review and reverse a previous decision	252
High Court —Reference—Precise question of law or usage must be formulated	261
Hindu Law —Agreement by a husband to pay a monthly sum for maintenance of his wife—Void for want of consideration. <i>Kuverbai vs. Kessouji Lalji</i>	389
Hindu Law —Custom among Sudras—Return by widow on remarriage of ornaments presented to her on her first marriage by her husband or his family—Act XV. of 1856, sec. 5. <i>Tukaram Maha lji vs. Janku</i>	135
Hindu Law —Landlord and tenant—Mortgage by Hindu—Right of purchaser under the mortgage to claim entire rent from tenants against an undivided son of the mortgagor where there has been no partition. <i>Ruttonji Aspandiarji vs. Sennu Asla.</i>	41
Hindu Law —Widow's estate in immoveable property—Intention to accumulate. <i>Rivett Carnac vs. Jevibai</i>	137
Hindu married woman living apart from her husband and earning her own livelihood, liable on her own contracts	40
Hundi —Payment of shahjog hundi obtained by fraud—Forged hundi. <i>Jaikisson Balaram vs. Umaji Bejaychand</i>	453
Hundi —Shahjog hundi indorsed to a particular person—Stolen hundi—Payment by drawee without enquiry to wrong person—Liability of drawee to lawful holder of hundi. <i>Guneshdas Ramnarayan vs. Luckminarayan</i>	409
Hundi —Suit by holder and indorsee against payee and indorser—Presentment to acceptor—Local usage at Bushire as to presentment—Negotiable Instruments Act (XXVI. of 1881), secs. 70, 71, 75. <i>The Imperial Bank of Persia vs. Futehchund Khubchand</i>	525

I.

	PAGE
Indent of goods to arrive —Prepayment. <i>See</i> CONTRACT .	437
Indent —Goods ordered through commission agents—Contract of agency. <i>See</i> PRINCIPAL AND AGENT .	216
Indian Companies Act (VI. of 1882), sec. 45—Contract with the company—Signing duplicate of the subsequently registered memorandum—Subsequent allotment and repudiation—Specific Relief Act (I. of 1877), sec. 23 cl. (h) and sec. 27 cl. (e). <i>The Imperial Manufacturing Company vs. Mun-chersha B. Wadia</i> .	210
Insolvent —Bond given after personal discharge in respect of a scheduled debt—Private settlement with one creditor without knowledge of the Official Assignee and other creditors—Implied agreement by creditor not to oppose discharge—Consideration—Public policy—Evidence—Untrue recital in bond—Contradiction allowed. <i>Navroji Nusserwanji Thuntli vs. Kazi Sidick Mirza</i> .	486
Insolvent —Onerous property of an Insolvent vesting in the Official Assignee—Right of Official Assignee to accept or repudiate such property—Taking possession tantamount to acceptance—Indian Insolvent Act (Statute 11 and 12 Vic. ch. 21). <i>Abdul Razak Haji Abdul Karim vs. John G. Kernan</i> .	539
Insolvent —Order and disposition—Indian Insolvent Act 11 and 12 Vict., ch. 21, sec. 23 .	66
Insurance —Valued policy—Stress of weather—Deviation—Delay at port of distress—Jettison of cargo—Damages—Jurisdiction—Act XV. of 1882, sec. 19 (l)—Liability of insurer. <i>Dharamdas Asanand vs. Kanji Liladhar</i> .	505
Interest —Penalty—Law of Damdupat .	11

J.

Joint debt —Deposit by joint-debtor of policy belonging to him to secure the joint-debt—Liability of other joint-debtor .	446
Jurisdiction —Foreigner—Non-resident foreigner carrying on business by his <i>munim</i> in the Bombay Presidency—Small Cause Courts Act (XV. of 1882), sec. 18. <i>Girdhar Damodhar vs. Kassigar Hiragar</i> .	375
Jurisdiction —Incomplete gift—Suit by an executor to recover promissory notes on the ground that the gift of them to defendant was incomplete—Act XV. of 1882, sec. 18. <i>Kharshedji R. Colah vs. Pestonji Cawasji</i> .	187

	PAGE
Jurisdiction — Title to immoveable property — Equitable defence — Plea by defendant of his own fraud — Act IX. of 1850, secs. 91, 98, 25. <i>Lakhmidas Khimji vs. Mulji Kanji</i> . . .	85
Jurisdiction — Splitting cause of action — Tradesman's account — Act IX. of 1850, sec. 34	71
Jurisdiction — Title to immoveable property — Form of suit — Practice — Leave to amend summons — Act IX. of 1850 — Act XXVI. of 1864. <i>Nowla Uma vs. Bala Dhurmaji</i> . . .	60
Jurisdiction — Valued policy — Stress of weather — Deviation — Delay — Jettison	505

L.

Landlord and Tenant — Mortgage by Hindu — Right of purchaser under the mortgage to claim entire rent from tenants against mortgagor's undivided son	41
Landlord and Tenant — Proviso for determining the lease if any portion of the demised premises be required for a public purpose — Meaning of public purpose — Rent paid in advance, effect of. <i>The Secretary of State vs. Ahmed Saheb bin Mahomed Makba</i>	449
Landlord and Tenant — Sub-tenant — Transfer of original lease — Continuance of sub-tenancy under the new lessee. <i>Vaghji Thakersi vs. Pragji Devji</i>	384
Leasehold Property — Covenant of title on part of vendor — Liability to purchaser to make good a claim of a prior incumbrancer. <i>Akmedbhai Kikabhai vs. Bhanji Damji</i>	151
Limitation — Limitation Act (XV. of 1877), sec. 19 — Acknowledgment inadmissible in evidence — Stamp Act (I. of 1879), sec. 34, sch. I., art. 1 — Evidence. <i>Murji Lala vs. Linga Mukaji</i>	482
Limitation — Limitation Act (IX. of 1871), sch. II. art. 72 — Promissory Note — Novation. <i>Natha Hira vs. Janardhan Ramchandra</i>	58
Limitation Act — (XV. of 1877), sch. II., art. 179, cl. 4	574
Limitation — Attorney and client — Bill of costs — Act IX. of 1871, sch. II. art. 85. <i>Hearn vs. Bapu Saju</i>	56
Limitation — Decree payable by monthly instalments — "In default of payment execution to issue for the whole amount which may then be due." — Instalments paid late. <i>Jivan Navroj vs. Jaibai</i>	458
Limitation — Decree payable by instalments — Oral application by decree-holder for withdrawal of money paid into Court —	

	PAGE
Step in aid of execution—Limitation Act (XV. of 1877), sch. 2. art. 179 (4). <i>Saraswatibai vs. Janardhan Sakharam Joshi</i> .	574
Limitation — Suit for board supplied — Keeper of hotel, tavern, or lodging-house. Act IX. of 1871, sch. 2, art. 8, 115. <i>Ravji Jairam vs. Bhanu Balu</i>	55
Loss of goods by Railway Co. — Liability. See RAILWAY ADMINISTRATION	422

M.

Malicious Prosecution , action for — Reasonable and probable cause — Effect of order of discharge of a person accused of an offence before a Magistrate — Presidency Magistrates' Act IV. of 1877, secs. 87, 121, 122. <i>Venu vs. Kurya Narayen</i>	106
Master and Servant — Breach of condition by servant — Agreement to devote whole time to employer's business — Auditing accounts for third parties out of office hours — Dismissal. <i>Dwarkadas Udharji vs. Bapty Brothers</i>	197
Master and Servant — Liability of master for negligence of servant — Bailor and Bailee — Proprietor and Driver of public conveyance — Bombay Act VI. of 1863. <i>The Bombay Tramway Co. vs. Khairaj Tejpal</i>	110
Merchant Seaman — Discharge and settlement — Claim — Evidence — Act I. of 1859, sec. 46. <i>Charles Thompson vs. P. & O. S. N. Co.</i>	2
Minority — Guardian appointed by the High Court — Act IX. of 1875, sec. 3 — Act VIII. of 1890, sec. 52. <i>Gordhandas Jadavji vs. Harivalabdas Bhaidas</i>	514
Mortgage by Hindu — Right of purchaser under the mortgage, as against mortgagor's undivided son, to claim entire rent from tenants	41
Mortgage or Pledge — Liability of goods mortgaged or pledged for distress. See DISTRESS WARRANT	169
Mortgaged property , sale of, by mortgagee — Conditions of sale. See VENDOR AND PURCHASER	154
Municipal Act — Bombay Act III. of 1888, sec. 142 (2) — Halalkhor tax — Where leviable — Opinion of the Commissioner conclusive — Section 158 (2), "may" equivalent to "shall." <i>Goverdhandas Gokuldas Tejpal vs. The Municipal Commissioner</i>	281
Municipal Act —Bombay Act III. of 1888, secs. 142, 156, 157, 248—"Premises," meaning of in sec. 142—Halalkhor tax,	

	PAGE
on what premises to be levied—Sec. 142 (3), construction of. <i>F. Y. Smith vs. The Municipal Commissioner</i> . . .	355
Municipal Act —Bombay Act III. of 1888, secs. 142, 158, 248—Halálkhor tax—Building consisting of ground floor and upper floors—Floors treated as separate properties—Under separate ward numbers chargeable separately. <i>Dharamsi Lalji vs. The Municipal Commissioner</i> . . .	362
Municipal Act —Bombay Act III. of 1888, secs. 142, 248—Halálkhor tax, on what premises leviable—Latrines on Port Trust Property. <i>Haji Allarakhia Nathu vs. The Municipal Commissioner</i> . . .	382
Municipal Act —Bombay Act III. of 1888, sec. 158—Tax—Drawback—General conditions prescribed by Standing Committee limiting right to drawback under sec. 158 not <i>ultra vires</i> . <i>Goverdhandas Gokuldas Tejpal vs. The Municipal Commissioner</i> . . .	363
Municipal Act —Bombay Act III. of 1888, secs. 301, 527—Payment of compensation to owner of land where there is no dispute—Notice—Limitation— <i>Maneklal Motilal vs. H. A. Acworth</i> . . .	430
Municipal Act —Bombay Act III. of 1888, sec. 2 (q)—“Vehicle” tax—Bicycle. <i>Hogan vs. The Municipal Commissioner</i> . . .	589

N.

Negligence —Death by negligence—Act XIII. of 1855—Suit for damages by parents of a child killed by negligence—Contributory negligence—Liability for negligence of servants—Damages—Deduction for maintenance of child—Funeral expenses. <i>Narayan Jetha vs. The Municipal Commissioner</i> . . .	297
Negligence of the crew and other servants of the ship . . .	173
Negligence of Master —Bill of Lading . . .	1
Negotiable instrument . See PROMISSORY NOTE . . .	102
Negotiable Instruments Act —(XXVI. of 1881), secs. 6, 8, 17, 30, 32, 78, 85, 92—Ambiguous instrument—Election to treat it as bill of exchange. See BILL OF EXCHANGE . . .	252
Negotiable Instruments Act —(XXVI. of 1881), secs. 70, 71, 75. See HUNDI . . .	525
Notice —Waiver—Rules 17 and 21 of the Bombay Cotton Trades Association . . .	131
Notice —City of Bombay Municipal Act (III. of 1888), secs. 301 and 527. See MUNICIPAL ACT . . .	430

O.

PAGE

- Official Assignee**, no power to consent to attachment of Insolvent's property 577
- Official Assignee**—Right to accept or repudiate onerous property. *See* **INSOLVENT** 539
- Order and disposition**—True owner—Indian Insolvent Act 11 and 12 Vict. c. 21, sec. 23—Constructive trustee. *Bhawan Mulji vs. Kavasji Jehangir* 66

P.

- Partnership**—Death of one partner—Suit by firm for debt accrued due during his life—His representatives need not be parties—Hindu joint and undivided family—Indian Contract Act (IX. of 1872), sec. 45. *Motilal Becherdas vs. Ghellabhai Hariram* 336
- Payment into Court** of amount of decree by third person . . . 557
- Penalty**—Promissory Note—Payment of interest—*Damdapat* . . 11
- Practice**—Amendment of plaint—Changing the cause of action—Plaint for damages for breach of contract to deliver will not support a decree for damages for breach of warrant. *Ma-khanlal Govindram vs. Vijbhukandas Nagardas* 317
- Practice**—Application to file award—Objection to the *factum* and validity of the submission and award. *See* **ARBITRATION** . 472
- Practice**—Attachment of shares in a public company standing in the names of the judgment-debtor and a third party. *See* **ATTACHMENT** 420
- Practice**—Power of Small Cause Court to attach and sell a debt of any amount. *See* **EXECUTION** 404
- Practice**—Presidency Small Cause Courts Act (XV. of 1882), sec. 69—Existence of a question of law a condition precedent to a case being stated to the High Court—Duty of Judge in stating a case. *Ishwardas Tribhovandas vs. Kalidas Bhaiddas* 508
- Practice**—Presidency Small Cause Courts Act (XV. of 1882), sec. 69—Court must state case on a question of law, if required, even where it entertains no doubt—Question of Law, what is. *Fulchand Gopalchand vs. Hari Vithal* 533
- Practice**—Presidency Small Cause Courts Act (XV. of 1882), sec. 69—Case stated for opinion of High Court—Precise question of law or usage must be formulated. *Ralli Brothers vs. Goculbhai Mulchand* 261

Practice —Presidency Small Cause Courts Act (XV. of 1882), sec. 69—Requisition for reference to High Court must be made before judgment delivered. <i>Bank of Bengal vs. Vyabhai Gangji</i>	290
Practice —Reference to arbitration by consent of parties—Application must be in writing. <i>See</i> ARBITRATION	336
Presidency Small Cause Courts Act (XV. of 1882), sec. 38	561
Principal and Agent —Goods ordered through commission agents—Contract of agency—Contract of sale—Form of action. <i>Mahomedally Ebrahim vs. Schiller Dosogne and Co.</i>	216
Principal and Agent —Unauthorised act of agent—Rules of Bombay Cotton Trades Association. <i>See</i> CONTRACT	131
Promissory Note —Agreement to pay interest after the expiration of period allowed for repayment of principal—Not a penalty. <i>Hakma Manji vs. Memon Ayub</i>	11
Promissory Note by a judgment-debtor for sum in excess of the sum due under the decree—Agreement not sanctioned by the Court. <i>See</i> CIVIL PROCEDURE CODE, sec. 257A	550
Promissory Note —Negotiable instrument—Material alteration. <i>Udaychand Budaji vs. Bhaskar Jagonnath</i>	102
Promissory Note —Novation. <i>See</i> LIMITATION	58
Public Conveyance —Bombay Act VI. of 1863—Proprietor and Driver. <i>See</i> MASTER AND SERVANT	110

R.

Railway Administration —Liability for loss of goods—Theft by a Railway servant—Indian Railways Act (IX. of 1890), sec. 75. <i>Balaram Harichand vs. Southern Mahratta Railway Company</i>	422
Railway Company —Act XVIII. of 1854, secs. 11 and 43—Carriers—Evidence—Burden of proof—Goods ready for delivery within a reasonable time. <i>Suratram Bhaya vs. Great Indian Peninsula Railway Company</i>	73
Railway Company —Ticket—Trespass—Act XVIII. of 1854, sec. 17—Act XXV. of 1871, sec. 2. <i>Pratab Daji vs. Bombay Baroda and Central India Railway Company</i>	45
Railway Receipt —Goods consigned to agent for sale on commission—Hundis drawn against goods and paid by agent—Equitable assignment of goods by consignor—Goods attached by judgment-creditor of consignor—Claim by agent—Priority—Civil Procedure Code, section 280. <i>Velji Hirji and Company vs. Bharmal Shripal and Company</i>	519

	PAGE
Railway Receipt —Not a document of title under Contract Act, sec. 103. <i>See</i> STOPPAGE "IN TRANSITU"	235
Railway Receipt —Conditions—Port Trust charges—Charges in force on Shipping Lines—Liability of consignee	393
Receiver appointed under Civil Procedure Code, sec. 503—Powers of—Certificate under Act VII. of 1889, sec. 4—Suit filed by Receiver appointed by High Court. <i>L. N. Banaji vs. Syed Haji Abdul Saheb</i>	277
Reference to High Court —Requisition to be made before judgment delivered	290
Reference to High Court —Condition precedent that questions of law or usage having the force of law or construction affecting the merits should arise	508
Rent paid in advance —Effect of. <i>See</i> LANDLORD AND TENANT	449

S.

Sale of goods for forward delivery—Non-payment of earnest money stipulated in the contract. <i>See</i> CONTRACT	470
Shipping —Bill of Lading—Construction—Delivery in Dock—"Landing or crange charges." <i>See</i> BILL OF LADING	114
Shipping —Bill of Lading, exemption clause in—Stowage—"Negligence of the crew or other servants of the ship." <i>See</i> BILL OF LADING	173
Shipping —Bill of Lading—"Weight, contents, numbers unknown"—Negligence of Master	1
Shipping —Demurrage—Sale of cargo to several purchasers—liability of one purchaser for default of other purchasers. <i>See</i> DEMURRAGE	199
Shipping —Merchant seamen—Discharge and settlement	2
Shipping order —Responsibilities for goods "shut out"—Condition reasonable. <i>J. R. Megreponce vs. Stearns</i>	7
Shipping order —S.S. "Mary Beyts" or substitute—Subject to safe arrival—Non-arrival of steamer by the cancelling date—Refusal to give substitute—Cancellation of order by shippers—No damage, allowed. <i>Killick Nixon & Co. vs. Beyts Craig & Co.</i>	309
Specific Relief Act —(I of 1877), sec. 23 cl. (h) and sec. 27 cl. (e) do not apply to contracts to take shares in a company. <i>See</i> INDIAN COMPANIES ACT	210
Stamp Act —(I. of 1879), art. I. schedule I—Acknowledgment unstamped—inadmissible in evidence	482

Step in aid of execution	PAGE 574
Stoppage <i>in transitu</i> —Railway receipts—Effect of endorsing Railway receipts—Title of endorsee of such receipts—Con- tract Act (IX. of 1872), sec. 103. <i>Great Indian Peninsula</i> <i>Ry. Co. vs. Hanmandas Ramkisson</i>	235
Suit, dismissal of, for default—Remedy of plaintiff	561

T.

Tax, Vehicle—Bicycle	589
Theft—by a Railway servant—Loss of goods. <i>See</i> RAILWAY ADMINISTRATION	422
Title to immoveable property—Leave to amend summons. <i>See</i> JURISDICTION	60
Title to immoveable property—Equitable defence. <i>See</i> JURISDICTION	85
Transfer of Property Act—(IX. of 1882), sec. 55—"Material defect in property." <i>See</i> VENDOR AND PURCHASER	460
Trespass—Travelling without a ticket. <i>See</i> RAILWAY COM- PANY	45
Trustee—Breach of trust—Liability of passive trustee for breach of trust by his co-trustee—Extent of equitable jurisdiction of Small Cause Court Act IX. of 1850, secs. 25 and 32—Act XXVI. of 1864, sec. 2. <i>Bai Jadhav vs. Tri- bhurandas Jagjirandas</i>	12

V.

Vehicle tax—Bicycle	589
Vendor's lien—Indian Contract Act (IX. of 1872), secs. 90, 95, 98, 108. <i>See</i> DELIVERY ORDER	123
Vendor and Purchaser.—Auction-sale by mortgagee of mort- gaged property—Conditions of sale—Condition that pur- chaser shall take such title as vendor can give where vendor has no title at all—Construction—Such condition implies possession of some title in vendor: <i>Motivahn vs. Vinayek</i> <i>Virchand</i>	154
Vendor and Purchaser.—Contract for sale of house—Title— "Fazandari ground"	5
Vendor and Purchaser — Leasehold property — Covenant of title on part of vendor — Liability to purchaser to make good a claim of a prior incumbrancer	151

Vendor and Purchaser —Right of purchaser under a mortgage by a Hindu, as against mortgagor's undivided son, to claim entire rent from tenants	41
Vendor and Purchaser —Transfer of Property Act (IX. of 1882), sec. 55—Meaning of words "Material defect in the property"—Concealment of defect—Right of purchaser to rescind. <i>Haji Essa Sulliman vs. Dayabhai Parmanandas</i> .	460

W.

Warranty, Breach of —Cause of action—Plaint for damages for breach of contract to deliver will not support a decree for damages for breach of warranty	317
---	-----

Words—

"Agriculturist"	142
"All other conditions as per charter party"	95
"Breakage" in a Bill of Lading	30
"Contract not to be cancelled"	305
"Costs in the case"	187
"Leakage" in a Bill of Lading	30
"Fazandari ground"	5
"In-take measurement" of cargo	95
"Landing or crantage charges"	114
"Land required for a <i>public purpose</i> "	449
"Loss, deterioration, or destruction" of parcel entrusted to a Railway Company	422
"Material defect in property"	460
"May" equivalent to "shall"	281
"Neglect or default of the Master, Mariners, or other servants of the ship"	173
"November, December, January shipments"	320
"Or" equivalent to "nor"	345
"Premises" in the City of Bombay Municipal Act III. of 1888, sec. 142	355
"Weight, contents, and numbers unknown" in Bill of Lading	1
"Weight, contents, value unknown"	21
"When the caste shall demand"	427

